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A

CONCISE ABRIDGMENT

OF THE

LAW OF REAL PROPERTY.

A

CONCISE ABRIDGMENT

OF THE

LAW OF REAL PROPERTY

AND AN

INTRODUCTION TO CONVEYANCING.

DESIGNED TO FACILITATE THE SUBJECT

FOR

STUDENTS PREPARING FOR EXAMINATION.

BY

JOSEPH A. SHEARWOOD,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW (FIRST CLASS CERTIFICATE OF HONOUR, 1869)

Editor of the "Law Student's Annual," and Author of "Concise Abridgment of Personal Property;" "Outline of Contract;" "Bar and Solicitor's Final Examination Guide;" "Digest of the Questions and Answers in the Bar, and Final Solicitor's Examination;" "Tabular Analysis of Trusts."

THIRD EDITION.

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PREFACE

TO THE THIRD EDITION.

ELABORATE revision has been made, and the Settled Land Acts and Cases thereupon, and other recent Acts and Cases, incorporated with the work.

Such of the former law on the subject of Real Property as is necessary to be read in order to connect it with the existing law is distinguished in this edition by being enclosed in brackets [ ].

The headings, cases, references, and Statutes of importance, are printed in Clarendon type, and the names of the text book which in the prosecution of his studies in Conveyancing the student is advised to peruse are in italics.

LIBRARY CHAMBERS, TEMPLE,
February, 1885

PREFACE

TO THE FIRST EDITION.

THE author, during some years' experience in preparing candidates for the Bar and Solicitors' Final Examinations, having frequently heard complaints of the verbiage and technical language in which the law and quotations from Acts of Parliament are presented in the books generally used for that purpose, and also of the lengthy recapitulations of the old law, hopes that a little treatise like the present, in which the design is merely to direct attention to the leading features of this important subject, and to lay down the present law, with remarks bearing on the past, in a few short paragraphs, may be useful to those to whom time is an object, and may also serve as an introduction to the study of more comprehensive works.

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TEXT BOOKS AND THE ABBREVIATIONS USED FOR THEM.

Atk.	Atkins' Reports.
B. & C.	Barnwell and Cresswell's Reports.
Beav.	Beavan's Reports.
Bing.	Bingham's Reports.
Bl. Com.	Blackstone's Commentaries.
Bro. Ab.	Brooke's Abridgment.
Burt. Comp.	Burton's Compendium.
Ch. Ca.	Cases in Chancery.
Co. Litt.	Coke on Littleton.
Cru.	Cruise's Digest.
Dart, V. & P.	*Dart's Vendor and Purchaser*, 5th ed.
De G. J. & S.	De Gex, Jones and Smith's Reports.
Drew.	Drewry's Reports.
East	East's Reports.
Eden	Eden's Reports.
Far. Pwrs.	Farwell on Powers.
Fearne, C. R.	Fearne's Contingent Remainders.
Gilb. Ten.	Gilbert on Tenures.
H. L. Cas.	House of Lords' Cases.
Jar. Wills	Jarman on Wills.
John. & H.	Johnson and Hemming's Reports.
K. & J.	Kay and Johnson's Reports.
L. R. Ch.	Law Reports—Chancery Appeals.
L. R. Eq.	Law Reports in Equity.
L. R. P. C.	Law Reports—Privy Council.
L. T.	Law Times.
My. & K.	Mylne and Keene's Reports.
Pask, Judg.	Pask on Judgments.
P. Wms.	Peere Williams' Reports.
Plowd.	Plowden's Reports.
Prid. Conv.	*Prideaux's Precedents in Conveyancing*, 11th ed.
Rep. 1, 2	Coke's Reports, 1, 2, &c.
Russ.	Russell's Reports.
Scriv.	Scriven on Copyholds.
Sid.	Siderfin's Reports.
Sim. & Stu.	Simons and Stuart's Reports.
Steph. Com.	*Stephen's Commentaries*, 8th ed. (vol. ii).
Sug. Pwrs.	Sugden on Powers.
Sug. V. & P.	Sugden on Vendor and Purchaser.
Tudor, Cas. Pry.	Tudor's Real Property Cases, 2nd ed.
V.-C. W.	Vice-Chancellor Wood.
Vern.	Vernon's Reports.
Ves. Sen.	Vesey's Reports, Sen.
Watk. Conv.	Watkins' Conveyancing.
Watk. Cop.	Watkins on Copyholds.
Wharton L. L.	*Wharton's Law Lexicon*, 6th ed.
W. R.	Weekly Reporter.
Williams' R. P.	*Williams' Real Property*, 13th ed.
W. & T. Cas. or L. C.	*White and Tudor's Leading Cases*, 5th ed.
Wils.	Wilson's Reports.

ABBREVIATIONS OF STATUTES.

Conv. Act, 1881, 1882,	denotes	the Conveyancing Acts, 1881 and 1882, respectively.
S. L. A. 1882, 1884,	,,	the Settled Land Acts, 1882 and 1884, respectively.
M. W. P. A. 1882, 1884,	,,	the Married Women's Property Acts, 1882 and 1884, respectively.

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CONCISE ABRIDGMENT

OF THE

LAW OF REAL PROPERTY.

PART I.—TENURE.

CHAPTER I.

REAL PROPERTY.—FEE SIMPLE.

Lands, tenements, and hereditaments, are usually meant by the expression, **Real Property.** But as far as hereditaments are concerned this is not strictly true; for some classes of property which devolve on the heir and not the personal representative on intestacy are personal—for instance, a **personal annuity,** which is a sum of money given to a man and his heirs—also title deeds and heirlooms. The word real is derived from *res;* it was so called because real property, which is chiefly land, is tangible and can be itself recoverable in an action. Many things, however, are included under the name of realty which are neither tangible nor visible but are of an incorporeal nature. All these are hereditaments, though they cannot correctly be classed under tenements. (See Appendix C.) **Real Property.**

Land is the soil and all attached to it—**Cujus est solum ejus est usque ad coelum.** Everything above and below the soil is comprised in the land and will pass by a grant of it; for instance, houses, woods, mines—even water; if a man wishes to grant a lake to another he grants so **Land.**

much land covered by water; by a grant of the water only a right of fishing will pass.

But if in a grant of land there are words to the contrary the things so excepted will not be included in the grant but will continue the property of the grantor, who will have in them the same estate as he had in the land itself.

On the other hand, things annexed to the soil and rights issuing out of it may be granted away independently, the grantor retaining the land, and they can as a rule be held for the same estates in regard to quantity and quality as the land itself.

Quantity. The word **quantity** is used in reference to the extent of the tenant's interest; it is the legal magnitude of the estate. Thus if A has a **fee simple** which may be defined to be an estate "capable of lasting for ever but which may determine sooner," and occurs when an estate is given to a man and his heirs generally, he is said to have a greater estate than B who has a **fee tail**, that is, an estate given to him and the heirs of his body—in fact to his descendants—the law considering that a man's issue must fail sooner or later, and then it will come to an end—while in the case of a fee simple the land will go to collaterals. The term quantity, it must be remembered, has no reference to the size of or number of acres in the property. For if Dale belongs to A in fee simple and Blackacre to B in fee simple the quantity of their estates is similar, although Blackacre may be but one acre in extent and Dale a thousand. (See Appendix A.)

Neither has the term reference to the duration of an estate in point of time. For a lease for one year and a lease for a thousand years are equal in quantity.

Quality. The word **quality** refers to the time of enjoyment, that is to say, whether it is in immediate possession or will be so at some future time, and also to the number and connexion of the tenants. Thus if A is tenant of Dale in

fee in severalty and B and C are joint tenants in fee of Blackacre the estates of A and B are different in quality though the same in quantity.

One man may have a house in fee and another the ground in fee; or if the house is subdivided in **chambers** there may be different owners in fee to each set. Also each owner in fee simple need not be in possession, for there may be tenants for years, for life or in tail, who will enjoy before him; but still he has the fee expectant on the determination of their interests.

Tenements are all things capable of tenure; all land is capable of tenure, but there are many more things subject to tenure which are not lands, as rents, commons, and some other kinds of incorporeal property. (See Appendix C.) **Tenements.**

Hereditaments (the most comprehensive expression) comprise most things which descend to the heir on intestacy. All lands and tenements so descend, but other things, such as personal annuities, and heirlooms, which are neither lands nor tenements, devolve on the heir and not on the personal representative, and are included in the definition. **Hereditaments.**

Some species of property in their nature personal are made real by Act of Parliament, shares in the **New River Company** affording an instance of these. Others are real from being extraordinary, incident to, and dependent upon a title and user of the land; as the profits arising from the tolls of a lighthouse—which are not subject to probate or legacy duty. (*Att. Gen.* v. *Jones*, M. & G. 574.)

Fixtures, chattels, vegetables, and things which, from being annexed to the land, pass with it, only retain this character until severance. They then devolve, as other personal property, on the executors and administrators. Title deeds, heirlooms, and animals *ferae naturae*, are considered inseparably attached to the inheritance and are included under a conveyance of it. In a mortgage of the property **fixtures** will be included and need not be registered under the Bills of Sale Act, 1878 (41 *&* 42 *V. c.* 31), **Fixtures.**

provided they are assigned together with the land. An exception occurs in the case of trade machinery, for mortgages of which registration is always necessary (*41 & 42 V. c.* 31, *s.* 47). [Before this Act there was a conflict of opinion whether the title of a mortgagee who had not registered would prevail over that of the trustee in bankruptcy of the mortgagor.] (*Ex parte Dalgleish, in re Wild*, L. R. 8 Ch. 1072. *Ex parte Barclay, in re Joyce*, L. R. 9 Ch. App. 576. *Meux* v. *Jacobs*, L. R. 7 H. of L. E. and I. 484. *Mather* v. *Fraser*, 2 K. & John. 536.)

[Originally a termor could not remove fixtures which he had set up, neither could a tenant for life devise them.] But this rule threw impediments in the way of agricultural improvements and prevented the letting of land, and has therefore been relaxed. The executor of a tenant for life may now take away fixtures belonging to him, and a termor may do the same any time before the end of the tenancy in regard to those erected for the purpose of trade or ornament. As to agricultural fixtures, 14 & 15 Vict. c. 25, s. 3, provides that when they are put up with the consent of the landlord in writing the tenant shall remove them on giving the landlord one month's notice in writing of his intention to do so; but the landlord shall have the option of purchasing them. The Agricultural Holdings Act, 1883, governs the law as to agricultural and pastoral holdings in this respect (see *post*, Ch. IX.).

The old law has not been altered so as to give fixtures to the executor of a tenant in fee simple instead of to his heir or devisee.

Minerals. A grant of the land will pass the minerals although no mention has been made of them except in a few cases when Acts of Parliament ordain the contrary; such as—

1. The Copyhold Enfranchisement Acts, 15 & 16 Vict. c. 51, s. 48, 21 & 22 Vict. c. 94, s. 14, where, in the absence of writing by him to the contrary, the lord retains the minerals.

2. The Railway Clauses Act, 8 Vict. c. 20,

The minerals may be reserved in a grant of the land or themselves conveyed independently of it.

Also, by S. L. A. s. 17, a sale, exchange, partition, or mining lease may be made of land with or without all the minerals by a tenant for life.

25 & 26 Vict. c. 108, also enacts that trustees having powers of sale and exchange of settled lands may, with the sanction of the Chancery Division obtained on petition, summarily dispose of the land without the minerals, or *vice versâ*, unless a contrary intention appears in the settlement.

Fee simple. Amongst the popular errors so prevalent on legal subjects one of the most conspicuous is that the land of the freeholder (when he has the fee) is absolutely his own—as much his own, in fact, as any personal chattel which he holds in his hand. It may be admitted that, practically, this is the case. Parliament may compulsorily take and apply the land for railway and other public purposes; yet, independently of this, it is, as a matter of fact, his entirely. But the law takes a very different view; it considers that there is but one absolute owner of all the land in England, and that one is the sovereign. This has been so ever since William the Conqueror, at Salisbury, in 1086, declared that he was the lord paramount of all the soil in the country. Therefore private owners are in theory merely the tenants of the Crown. [The terms of the tenure were originally of a military (tenure in chivalry) or of an agricultural (tenure in socage) nature, and continued to be so until the Restoration, when, owing to the complete disuse during the Commonwealth of the feudal incidents or burdens which attached to tenure in chivalry, it was deemed unwise, if not impossible, to restore them;] consequently at the instance of Lord Clarendon, a bill was passed (12 Car. II. c. 24) called the **Statute of Tenures**, procuring their complete abolition, and vesting in the king a revenue of about £1,200,000 per annum instead, which revenue has undergone many subsequent alterations. All

Fee simple.

tenures, with a few exceptions (see *post*, Appendix B.), then became **Socage**—a word derived either from "Soc" (Saxon) a privilege, or (French) a ploughshare—and socage they continue till now. The only substantial benefit which the Crown derives from being lord paramount is the right of **escheat**—occurring when the possessor dies intestate and without heirs lineal or collateral. [Until recently there was also **forfeiture**, *propter delictum tenentis;* this happened when the tenant committed felony or treason; his blood became corrupt and those who had it in their veins could not inherit; but this, after having been much curtailed of late years], is, except in the case of outlawry—for those who will not submit to the laws cannot expect to benefit by their ameliorations—now abolished by 33 & 34 Vict. c. 23.

William the Conqueror on parcelling out the lands of the kingdom allotted those which he did not choose to leave to their original owners to his favourites; the term of enjoyment was for life—less, a Norman knight would not accept, and the Conqueror did not choose to give more; the favourites in return yielded him **Knight service**, the military tenure just spoken of; the duties which they had to observe were called the **feudal incidents** and the system the **feudal system**. From this feudal system originated the custom of primogeniture, which was not known amongst the Saxons; for life estates did not continue long, and as, when the father died, the estate, reverting to the Crown, must have been again granted to some one, it was natural that the offspring of the deceased should expect it, for they were on the spot and known about the place; and the father had no doubt trained them to continue the services he had rendered himself. What was at first a favour soon grew to be a right; and the estate was often granted at once to a man and his heirs, in which case his issue could succeed him without any further grant. If all his sons had shared, it would have tended to subdivide the property and make confusion in regard to the duties, therefore the privilege was allowed to the eldest only, as he would most probably be a

grown man and better fitted to sustain the arduous toils in the field; but the reason of again allowing his son to succeed before his next brother is not so clear; perhaps it was for the sake of uniformity; besides, as we hear from Glanville, before this last point was established **escuage**—that is a payment in money in lieu of personal service—had become universal (temp. Hen. II.), so that the necessity of the tenant being capable of bearing arms was done away with.

Heir. The word **heir** leads us to another popular misconception. Often one person is spoken of as being another's heir during the lifetime of the latter, and men often say they will make such and such a one their heir. Now the heir is appointed by act of law and not by act of party; if A leaves his property to B, B is a devisee and not an heir. The heir is the person who succeeds to his ancestor's land on intestacy; no other person in legal language is called an heir. Therefore one man cannot make another one his heir. Also it is never determined who is the heir until the ancestor's death. *Nemo est haeres viventis.* For the eldest son may predecease his father, and then—not he—but the second son will be heir, that is, if the eldest has left no issue. Therefore strictly no man can have an heir till he is dead.

The heir is the only person who cannot **disclaim**—that is, refuse to take the estate; but he may dispose of the property directly he gets it; and he cannot now be made liable for any incumbrances or charges made by his ancestor beyond the value of the estate; [though anciently when the ancestor warranted lands expressly for himself and his heirs the heir was bound to give the person to whom the warranty was made lands of equal value in the event of eviction, even though he had not received any estate by descent. But the power of warranties was curtailed by Edward I.

A gift to a man and his heirs did not include collaterals till the time of Henry II., at which period a freehold

could be granted in three ways—*e.g.*, "Grant to A," which gave merely a life estate; "Grant to A and the heirs of his body," which gave future life estates to his issue as well as one to himself; and "Grant to A and his heirs," in which any one of his blood (excepting his direct ancestors or half blood) who was nearest in degree succeeded to the property at his death. The words "heirs" and "heirs of the body" were **words of purchase** and not of limitation, which means that they did not give any greater estate to A than if they had not been used, but were indicative as to who was to take the land after him. Yet from the time when these words first began to be used in grants the tenants endeavoured and finally succeeded in getting their own interests extended beyond their lives, and in the reign of Henry III. these expressions were mere **words of limitation**—*i. e.*, marking out the estate of the ancestor—and neither the lineal nor collateral heir derived any benefit at all. Thus a grant to A and his heirs gave A a **fee simple**—the largest estate allowed in real property; that is to say, he could sell an estate to a purchaser which would continue to be his as long as he or any of his heirs lived, or until he again disposed of it, or until by neglect in performing the duties or by corruption of blood it became forfeited.

Fee simple conditional.

A grant to A and the heirs of his body gave him what was called **a fee simple conditional at the common law**—*i. e.*, that as in his case his collaterals could not succeed, until he had issue born, he had merely a life estate; but then he could alienate a fee simple, which he would generally do at once, for if the issue died his estate was for all intents and purposes again the same as one for life. If he died without disposition his issue would take, and if he had no issue it reverted to the donor.

This power of alienation was of gradual growth. At first the expectations of the heirs could not be interfered with; the lands were tied up *in infinitum*, and perpetual

entails established, such as were permitted, as we shall presently see, between the reigns of Edward I. and Edward IV. This leads us to notice a third popular error on the subject of real property, which is, that an entailed estate must continue to descend from father to son for ever, and that no tenant in possession can divert it into another channel; whereas in truth this has never been permitted except at the two periods just mentioned, viz., between Edward I. and Edward IV., and prior to Henry III. Permitting the ancestor to defeat the heir is not to be wondered at, as prohibiting it has been found mischievous; but it is surprising why he was allowed to interfere with the other person who had an interest in his decease, viz., the donor of the estate, who was entitled to the services rendered in return for the gift, and more, to have the whole land back again if the tenant died without heirs. This donor being the Sovereign or a powerful lord, would not be likely to submit tamely to any infringement on his right; yet it is certain that both heir and lord were, in the time of Henry III., entirely in the power of the donee of an absolute or conditional fee.]

Quia Emptores.

This was the cause of the two great statutes in the succeeding reign—De Donis and Quia Emptores, so called from the words they commenced with. [When the donees disposed of the land, or part of the land, they generally created a tenure between themselves and their grantees, reserving to themselves rights similar to those which they themselves rendered. This practice was called **subinfeudation.** A grants the whole or a portion of his land to B, reserving certain services; B subsequently makes a similar grant to C on like conditions, C to D, D to E, and so on. Here B, C, D and E have each a fee simple which they hold of the donor, acknowledging no superior lord. Subinfeudation was extremely injurious to the original grantors, and tended to deprive them of their dues. It was partially but inefficiently checked by Magna Charta,] and finally

prohibited by Quia Emptores, 18 Edw. I., one of the few old statutes which has never been meddled with by modern legislation. [The only class to whom it did not apply were the king's **tenants in chief** or **in capite** (those holding directly from the king himself)], but it was extended to them by Edward III. Its purport was to the effect that if C (suppose) wished to enfeoff D, he, C, by so doing would relinquish all chance of getting his lands again or any services in consequence of his grant. He could reserve nothing. He was out of it, and D would stand in his place and hold as he did from his superior lord. Quia Emptores, therefore, while it freely permitted alienation, abolished subinfeudation. It only applied to estates in fee simple, and so did not prevent a man from reserving a tenure when he granted any interest short of his own, such as a fee tail or a life estate, but it would not allow anything to be reserved when a fee simple had been parted with. [The right to alienate, though universal, had not begun to be considered an inseparable incident to a gift of land before the passing of this statute, as evidenced by the fact that in the previous reign feoffments were often made to a man, and to his heirs, and to whomsoever he should wish to assign the land;] but since the statute any prohibition to alienate has been considered repugnant to the nature of the estate, and is entirely void. These remarks only relate to alienation *inter vivos*, [for devise was not permitted till the reign of Henry VIII.]

[The reason for subinfeudating originally was because the lord could not have a new tenant imposed on him without his consent, though after the introduction of escuage this was immaterial; however it had then become customary, and being advantageous to the mesne lord continued till it was put an end to. The fact of services being indivisible was another reason in its favour.

Seignory. When a man had granted away a fee simple what he had left was called a **seignory**; this seignory and its incidents

were attached to his manor. In the manor there were demesne and waste lands; the tenants had rights of common over the wastes, which were freehold or copyhold according to the nature of the tenure.

In most manors parts were subinfeudated to freeholders and parts to copyholders; but sometimes the seignory was separated from the lands; it was then called a **seignory in gross.** The lord himself might have been a copyholder; then his superior lord would have a freehold interest in the wastes.] Manors still exist, but they must have been created before Quia Emptores, or, in the case of tenants *in capite* holding *de corona*, before 34 Edw. III. c. 15. [They had three courts—the **Court Baron,** a domestic tribunal, long since obsolete, for redressing matters arising in the domain; the **Court Leet,** a criminal court, also obsolete;] the **Copyholders' Court,** which is still held to effect conveyances of copyholds. [Two or more copyholders originally formed the court; they were called the homage, being obliged to perform that ceremony,] but now no copyholder need be present. The presiding officer is the steward, who keeps the court rolls wherein the proceedings are entered. He is usually a solicitor, and makes the entries himself. Copyholders were the villeins or serfs, whose condition, once little better than slavery, has gradually become alleviated, and now their position is almost the same as that of freeholders.

[If several manors were held under one great baron his seignory was called an **honor.**]

The king, who was the ultimate lord of all the lands in the kingdom, was styled lord *paramount;* his tenants *in capite*, and others who had subinfeudated, were *mesne lords;* and the persons who held in fee of them tenants *paravail.* These tenants were said to hold *immediately* of the mesne lords and *mediately* of the king.

There were four species of tenures, the criteria of which

were the nature of the services which were due to the lords from the tenants.

These **services** were free and base, certain and uncertain.

Free services were incident to tenure by **knight** service and in socage.

The feudal incidents. Knight service.

I. Tenure by **knight service** or in chivalry was the most honourable kind of tenure. It was abolished by 12 Car. II. c. 24. The incident fruits which it drew after it, and which were uncertain, were as follows:

Wardship.

1. On the death of the tenant the lord became guardian to the heir until he became twenty-one if a male, and fourteen if a female (or sixteen if she remained unmarried by St. West. I.). He held them without having to give any account. This was because a minor could not perform knight service, nor an infant female marry a man who could, and therefore the lord kept the profits until they could do so. On attaining the age they sued out their livery or ousterlemain, which meant delivering their lands from their guardian's hand. For this they had to pay a

3 Edw. I. c. 22.

Fines.

2. **Fine**, which was half a year's profit. The male then must receive knighthood or pay another fine. If he desired to alienate his probably impoverished estate he had to pay a third fine for permission to do so; though this only seems to apply to the king's tenants *in capite*.

Marriage.

3. The lord could choose a suitable match for the ward; and if he refused he forfeited a sum equal to what his proposed partner would bring the lord, and in the event of marrying some one else, double as much.

Aids.

4. He was also liable to **aids**, which were
    1. To ransom the lord if taken prisoner.

2. To make the lord's eldest son a knight.
3. Suitably to endow the lord's eldest daughter.

But other and more oppressive aids were often exacted, to prevent which Magna Charta enacted that no others should be allowed.

5. A **relief** or payment in money was also due from those heirs who were twenty-one at their ancestor's death. This was originally arbitrary, and consisted of armour, but the "assize of arms" (27 H. II.) limited it to 100 shillings for every knight's fee (12 ploughlands), and provided that every man's armour should descend to his heir. Relief.

6. The king's tenant *in capite*, if of full age, was liable to **primer seisin**, or rendering a whole year's profits of the land on taking up the estate. Primer seisin.

Relief and primer seisin were only due if the heir was of full age when the ancestor died.

7. Every tenant had to take the oath of **fealty** to his lord and to do him— Fealty.

8. **Homage**, kneeling to him and professing to be his liege man. Homage.

9. And every lord who had two or more tenants could compel them to attend the Court Baron, whence they were called free suitors, and the attendance **suit of court**. Suit of court.

10. If the tenant died without heirs the lands **escheated** to the lord, and if he committed felony they were forfeited to him, subject to the right of the Crown to possess for a year and a day and waste (*i. e.*, to commit any waste), or for treason to the king absolutely by 26 Hen. VIII. c. 13. Escheat.

These burdens were exceedingly grievous; the minor was often plundered out of a great part of his property, and then, as Sir Thomas Smith very feelingly complains,

"that when he came into his own, he found his woods decayed, houses fallen down, stock wasted," and then, to reduce him still further, he had to pay for getting it into his own possession, and again to pay if he wished to get rid of the wretched remnant and the burdens attaching to it.

There were varieties of Knight Service, distinguished by special services; as Grand Serjeanty, which still remains (see Appendix B)—Tenure by Castle Guard—Tenure by Cornage, which was to blow a horn at the approach of the enemy.

Socage.

II. **Socage tenure**, which was of an agricultural nature, and in which the services were certain, was far more advantageous, and prevails over the greater part of England at present. [The tenant was liable to fealty, suit of court, aids, relief (which was fixed at one year's rent), primer seisin, fines—in fact, most of the incidents excepting (i.) wardship, the guardian being the next of kin, who could not inherit, who was accountable, and who acted till the ward was fourteen, at which period the heir could oust the guardian and choose one himself, and (ii.) marriage.] All the feudal burdens being abolished by the Statute of Tenures, he still remains liable to quit rents, reliefs, suit of court, fealty, and escheat. By the Act 1881, s. 45, all quit rents,[1] chief rents, and other sums issuing out of the land may be redeemed by the owner on obtaining from the Land Commissioners[2] a certificate of the amount to be paid for redemption and then after a month's notice paying the amount to the person entitled, the Commissioners

[1] Quit rent includes the rent immemorially due from freeholders and copyholders of a manor (rents of assize), and the small tenure rents due from a tenant in fee. Chief rents are those payable by freeholders.

[2] By ss. 48, 49 of the Settled Land Act, 1882, the Inclosure, Tithe and Copyhold Commissioners are styled the Land Commissioners of England and Wales.

giving a final certificate that the rent is redeemed. The land was also subject to forfeiture, *propter delictum tenentis*, now, as stated supra, p. 6, abolished. The Statute of Tenures, when doing away with the right of wardship, permitted the father to appoint a guardian, though since the Wills Act, 7 Will. IV. & 1 Vict. c. 26, he cannot appoint by will unless he is himself of age. The guardian must account to the heir on attaining his majority.

CHAPTER II.

ESTATES TAIL.

[We have said that a gift to a man and the heirs of his body was called a fee conditional at the common law, and that until he had issue he had merely a life estate, but when issue was born to him he had an absolute fee, but one liable again to become a life estate if that issue died. This evidently was not the purpose of the donor, and] the Statute *De Donis Conditionalibus* (13 Edw. I. c. 1), called also the Statute of Westminster II., enacted that in all future gifts of tenements the will of the donor should be observed, and that the donee should have no power to defeat the expectations of his offspring. This was in fact cutting down the estate of the donee to a mere life tenancy. If he had no issue the estate reverted to the donor. Such an estate was called an estate tail, being a *feudum talliatum* (*tailler*) or mutilated fee. The Act does not apply to copyholds nor to hereditaments which are not tenements. Therefore in these estates there can still exist a fee simple conditional at the common law. In some copyholds, however, a custom to entail has grown up. (*Vide post*, c. 5.) [Two evils followed this statute. Heirs finding they could not be disinherited became disobedient; and, secondly, by intermarriage during successive generations, enormous estates became centred in one family, thereby defeating the object of William the Conqueror, who so divided the lands that no baron could be strong enough singly to defy the Crown. Of this we have in-

stances during the Wars of the Roses, which were entirely waged between the barons, the people taking little part in them (Green's "History of the English People," c. vi., s. 2); Kingmaker Warwick, for example, is said to have fed daily 40,000 retainers, and was so powerful that his defection from the Yorkists entirely turned the tide for a time against Edward IV. This astute prince seeing how, as in France, the colossal growth of baronial power would jeopardize the stability of his dynasty, resolved to change the system; the statute could not be repealed as the lords would not consent; and the judges, then being subservient to the king, as they held their commissions *durante bene placito*, consented to effect it by a fictitious process called a recovery, which was first achieved in Taltarum's case (12 Edward IV.), and continued in vogue for about 350 years. A simpler method would not do, for then the issue could have recovered by writ of formedon, claiming *per formam doni*. Fines also were ineffectual, not barring reversioners and remaindermen.

Common recoveries.

The machinery of a recovery was as follows: A third person, generally the steward of the estate, sued out a writ called a *præcipe quod reddat* against him, alleging that he merely held by *descent cast*, which means that he succeeded after one X had ousted the demandant. The defendant then brought forward (generally) the crier of the court, who he said had granted him the estate and **warranted** the title. The demandant then craved leave to imparl with the crier (who was called the **common vouchee**, because he was always made use of in these actions) in private, and the crier did not reappear. Judgment was accordingly given against the defendant, and also that the defendant should recover lands of equal value from the crier who had failed to substantiate his warranty. But this was absurd, for the crier had no lands; neither was it desired, for the demandant could not retain the lands. Equity would see to that; he had

If the tenant in tail was in possession.

to hold them as trustee for the defendant. But if the land instead of being granted to A and the heirs of his body was granted to A for life, remainder to the heirs of his body, the proceedings were of a more complicated nature. Suppose A is tenant for life and B tenant in tail in remainder. There was no use in bringing the action against A, for that would not bar B; nor against B, for he was not in possession. Therefore it was usual for A and B to convey to some friend C (which was called making tenant to the præcipe), against whom the action was brought by the demandant, the steward suppose. The tenant to the præcipe then vouched B, and B vouched the common vouchee, who thereupon made default. This was called having a **double voucher**, and became usual even when A was tenant in tail in possession, for otherwise only the estate of which he was actually seised would be barred, and not every latent interest which he might have in the land. Bro. Ab. tit. Taile, 32; Plowd. Manxel's case (8).

If the tenant in tail was not in possession.

Fines.

If A was life tenant and B tenant in tail in remainder, A would be tenant to the præcipe, and B could not bar it without A's consent, so as to defeat any interests after the determination of his estate tail. But by a **fine** he could create what was called a **base fee**, which was a fee simple determinable on failure of his issue. A **fine** was also a fictitious proceeding, and different from a recovery in this wise, that in a recovery the action was carried through to its ending, whereas in a fine there was a compromise. A brought an action against B for breach of a supposed agreement to convey to him the lands in question. Then came the *licentia concordandi* and afterwards the concord itself, which was an acknowledgment of B the cognizee's title. As this was a tortious conveyance and would bar parties not privies to it if they did not claim to have it set aside in one year and a day afterwards (hence the name, from putting an end to controversies), various statutes were passed enacting that *proclamations* should be

necessary to bar on non-claim, the time for putting in which claim was subsequently extended to five years.

Fines are of great antiquity,[1] and were always used by married women when they wished to convey their lands. They were first applied to barring estates tail in the time of Hen. VII., but as they did not defeat the reversions and remaindermen they were not so convenient as recoveries, and were only used to create a base fee.

Perpetual entails being thus prevented, and property being unable to be tied up after the tenant in tail came into possession, the way left for landed proprietors to keep estates in the family was as follows: The tenant in tail, if in possession himself, barred and resettled; or, if in remainder, the particular tenant (*i.e.* the tenant for life in possession) would, when the remainder was conveyed to him, do the same; a deed was executed giving the directions to which the recovery was to enure, which was generally to reserve a life estate to the previous particular tenant, the father, then giving after his death a life estate to the previous tenant in tail, remainder to his first and other sons (then unborn) successively in tail. The father while he lived continued in possession: when he died the son succeeded him, and when the grandson came of age his father would with his consent again bar the entail and resettle, he being then able to limit the property after his death as his was then a life in being. Thus the land was tied down for one generation longer. The grandfather could not have done this; at the time of the first resettlement, the son was living, but not the grandson, and there could be no gift to the son of an unborn person: the grandfather was able to give the estate tail to the unborn

[1] Fines were very convenient for conveying estates which could not be alienated in any other way. In this way a contingent remainder could be disposed of; also a landlord could thus convey his reversion without the necessity of attornment, that is, obtaining the consent of the tenant. Attornment, however, was abolished by Queen Anne.

son of his son, *viz.*, his grandson—but the law did not permit him to make any limitation beyond this; and when the grandson came of age, if he would not consent to the resettlement proposed by his father, when that father died he would become absolute tenant in tail in possession, and could bar and make away with the property however he pleased. Also—as we have said—if the tenant in tail desired to bar, and the particular tenant would not consent, he could by a fine create a fee simple, terminable when his issue failed. Therefore a second difference between a fine and recovery arises, that a fine would not bar the reversioners and remaindermen expectant on the tenancy in tail, while a recovery would bar everybody. If the deed resettling the property was executed before the recovery it was called a deed to **lead to**, and if executed after, **to declare uses.**]

The Fines and Recoveries Act. Fines and recoveries being cumbrous and expensive were abolished by 3 & 4 Will. IV. c. 74, and more simple modes of assurance substituted; an ordinary deed enrolled in the Chancery Division in six months after its execution being sufficient to disentail; and if so enrolled, it will take effect from the time of its execution, except as against persons claiming for valuable consideration under a prior enrolled deed (although subsequently executed), and without express notice of the estate created by the subsequently executed deed (ss. 38, 74). **Protector.** **A protector**, whose consent is necessary to enable a tenant in tail in remainder to obtain a fee simple, is substituted for the old tenant to the præcipe; he is not necessarily the first life tenant, for any number of persons not exceeding three may be protector, although they have no interest in the estate; the office is personal, and the consent may be given or withheld from pure caprice, but when once given it cannot be withdrawn; further, it must be given by the same deed as that which bars the entail, or by a separate deed executed on the same day or previously. If there is no protector appointed,

sect. 22 provides as follows:—That if at the time when there is a tenant in tail under a settlement, there is subsisting, in the same lands under the same settlement, any estate for years determinable on the dropping of a life or lives or any greater estate (not being an estate for years) prior to the estate tail, the owner of such prior estate, or the first of such prior estates, if more than one, then subsisting under the same settlement, or would have been so if no absolute disposition thereof had been made, shall be the protector of the settlement, although the same may have been charged or incumbered or absolutely disposed of; and an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement, is to be deemed a prior estate under the same settlement within the meaning; and an estate by way of resulting use or trust to or for the settlor is deemed an estate under the same settlement. Where there are two or more of such persons each shall be sole protector as to his share (s. 23). Where a married woman, if single, would be protector, she and her husband, and if the prior estate is settled to her separate use, she alone, shall be protector (s. 24).[1] But no doweress, heir, executor, administrator or bare trustee shall be protector (s. 27). If the protector is a lunatic or person of unsound mind, the Lord Chancellor, and if a traitor or felon, the Court of Chancery, shall be protector (s. 33). If there is a trustee and a cestui que trust of the prior estate, it is now settled that the latter shall be protector (*Re Dodson's Contract*, 8 Ch. D. 628). In *Clarke* v. *Chamberlin*, 16 Ch. D. 176, trustees appointed protectors who died, and the tenant for life, and not the new trustees, was held to be protector. Except in the simplification of the machinery the Act does not make much difference;

[1] In the case of property (see *post*, Pt. 2, c. 1) under the Married Women's Property Act, 1882, she alone will be protector, as she stands in the position of a feme sole as to that property.

resettlements continue as above narrated. The tenant in tail in remainder without the consent of the protector can only create a base fee as before, but this can be enlarged into a fee simple by afterwards obtaining the consent of the protector and making a new disposition, and also if the base fee and the next estate in fee expectant thereon become united in the same person. Also by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57, s. 6, coming into effect 1 Jan. 1879), the assurance of a tenant in tail without the consent of the protector shall be effectual against any person claiming in defeazance of the estate tail, provided the person claiming by virtue of such assurance shall be in possession for twelve years after the time when the assurance of the tenant in tail, or any person claiming under him, would have been a complete bar to any subsequent estates.

Peculiarities. An estate tail can be alienated as above described, but in no other way. It cannot be left by will, nor could it be disposed of by contract. But a tenant in tail in possession, unless the land whereof he is restrained from barring the entail was purchased with money provided by Parliament in consideration of public services, is one of the persons who may exercise the powers of the Settled Land Act, and may therefore contract to make any sale, exchange, partition, mortgage or charge (s. 31). As for the other powers, see the Act, *post*, p. 41. [It was liable for no debts till Henry VIII. charged it with Crown debts], but now under the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), execution must be issued and registered before affecting it; then the Fines and Recoveries Act made it seizable on Bankruptcy to the same extent as the tenant in tail could himself have barred it: and lastly, 1 & 2 Vict. c. 110 has rendered it liable to Judgments. [26 Henry VIII. c. 13 also made it absolutely forfeitable for treason, as the blood of the children was corrupted.] It must be remembered that instances of tenants in tail in possession rarely occur;

most estates of this nature are in settlement, and the party holding is merely tenant for life; and whenever a tenant in tail happens to be in possession he usually bars it at once, owing to the superior power he thus obtains of free disposition. He can commit any waste he pleases.

[**Leases.**—32 Henry VIII. c. 28 permitted a tenant in tail to lease under certain conditions, but as the power was limited and the leases, though binding on the issue, could be set aside by the remainderman, this statute was repealed by the Settled Estates Act, 1856], now repealed by the Settled Estates Act of 1877, under which Act (ss. 23, 46, 55), a tenant in tail can make the same leases as a tenant for life (see p. 31). The Fines and Recoveries Act (s. 41) allows him to lease for twenty-one years, by deed, without enrolment, provided the tenancy commences in a year from the date and the rent reserved is a rack rent or five-sixths of one. **Leases.**

By the Settled Land Act, 1882, ss. 6, 7, he may lease for any term not exceeding, if a building lease, ninety-nine years; if a mining lease, sixty years; if any other lease, twenty-one years; such leases to be by deed and to take effect in possession not later than twelve months from date —at the best rent, with a covenant for payment and a condition for re-entry on non-payment in thirty days—and a counterpart to be executed by the lessee and delivered to the tenant for life.

By sect. 10, with permission of the Court, given under special circumstances, a building or mining lease may be made for any term or may be granted in perpetuity.

By sect. 12, he may make leases (i) to give effect to a contract for a lease entered into by any of his predecessors in title, where such lease, if made by the predecessor, would have bound the successors in title; (ii) to give effect to a covenant for renewal, the performance whereof could be enforced against the owner for the time being of the settled

land; and (iii) to confirm a previous lease, being void or voidable.

By sect. 13 he can accept a surrender of any lease, with or without consideration, whether made under the Act or not, and such surrender may relate to the whole or part of the land.

By sect. 14, he may license copyholders to make any such leases of their copyholds, as the Act empowers a tenant for life to make of freeholds.

Independently of these statutes a tenant in tail cannot make a lease for longer than his own life, for when he dies the estate goes to his issue, or if he has none, to the reversioner or remainderman, and he has no further power over it. The same rule applies to a tenant for life. Therefore neither of them can grant a lease for years. These are exceptions to the rule that a man can grant an estate less in quantity than his own—an estate for years being a chattel interest and consequently less than a freehold.

Heirlooms.

Heirlooms.—The Settled Land Act, 1882, s. 37, allows the tenant for life (the word including a tenant in tail, see p. 22), by order of Court, to sell personal chattels which are settled on trust so as to devolve with the land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of inheritance in the land, the money to go as capital money, or to be invested in other chattels to be similarly settled.

How arising.

Estates tail arise by act of party, *i. e.*, where given by deed or will; also by **implication of law**—as, where Dale is devised to A, and over to B on an indefinite failure of the issue of A. Also in cases where the doctrine of cy près is applied. See *post*, Pt. 2, c. 1, on Voluntary Alienation.

Kinds.

An estate tail general occurs when any of the heirs of the body male, or female, or both, may succeed.

An estate tail special occurs when only particular heirs

may succeed, as the children of a **particular wife.** The estate tail vests in both persons if the words of inheritance are applicable to both—as, where Dale is given to A and B and the heirs of their bodies; and it is an estate tail if they are both single or even married to other persons. It only vests in one, where the words of inheritance apply to one alone, as where Dale is given to A and his heirs by his now wife, B. When this wife is dead the tenant is called **tenant in tail after possibility of issue extinct.** Such a tenant practically is a mere life tenant, for he cannot disentail, and the law considers them so far equal that they may transfer with one another by the conveyance of exchange. He can commit legal but not equitable **waste,** in which respect he stands on the footing of a tenant for life without impeachment of waste. The death of the wife will alone create this estate, for the law considers a man may have issue however old he may be.

An estate tail given by the crown for public services cannot be barred as long as the reversion continues in the Crown; 34 & 35 H. VIII. c. 20; [neither could one given **ex provisione viri** (an old form abolished by 3 & 4 Will. IV. c. 74), which occurred when land was entailed on a woman by her husband or on both of them by his ancestors. This she could not bar without the consent of the reversioner or remainderman.] Also a few entails created by particular Acts of Parliament cannot be barred. **A quasi entail** occurs when A, tenant for life, gives an estate tail to B and the heirs of his body. This is an estate **pur autre vie,** and A is called the **cestui que vie.** When A dies B's estate naturally terminates, but while he lives it descends like an ordinary estate tail. As B would be very apt to pretend that A was alive when he was dead and thus keep the next tenant out of possession, 6 Anne c. 18 enacts that the cestui que vie may be produced, and if he is not forthcoming he shall be considered dead, and the tenant pur autre vie holding over shall be a trespasser. **Quasi entail.**

B, if he is tenant in tail in remainder (that is, if A grants to C for life, remainder to B and the heirs of his body) can only bar his own issue (as in an ordinary estate tail) without the consent of C, the tenant for life, but if he is in possession, as in the first instance put, he can dispose of the estate for A's life by any act *inter vivos*, without a declaration of his intention to do so, even by articles of agreement and also by will (1 Vict. c. 26, s. 3).

Summary of the Powers of a Tenant in Tail.

To sum up—the extent to which a tenant in tail can affect his issue and deal with the property is at the present day as follows:—

I. **By barring.**—1. Pursuant to the Fines and Recoveries Act with the consent of the protector if there is one, without if none, he can bar his issue and everybody.

2. Without the consent of the protector he can, unless he is also tenant in fee in remainder expectant on his own estate tail, create a base fee defeating his issue only. At present the position of a purchaser of such an estate is practically as follows:—

i. As soon as there ceases to be a protector, or during the protectorship, with the protector's consent, his estate can be enlarged into an absolute fee simple by the tenant in tail by another enrolled deed, and whenever he becomes entitled to the immediate expectancy, as by the person entitled releasing to him, his estate becomes *ipso facto* enlarged (3 & 4 Will. IV. c. 74, s. 39).

ii. If the tenant in tail predeceases the protector leaving issue, then, as stated on p. 22, if the issue do not fail for twelve years the estate is *ipso facto* enlarged into an absolute fee simple, as it is in any case if the purchaser is not ousted for twelve years after the protector's death.

iii. If the tenant in tail predeceases the protector with-

out leaving issue, the purchaser of the base fee may be ejected by the reversioner or remainderman.

II. Without barring, a tenant in tail can bind and affect the position of his issue and the remainderman as follows:—

1. He can deal with the estate under the Settled Land Act, 1882. (See p. 39.)
2. He can commit any waste.
3. He can lease under the Fines and Recoveries Act, the Settled Estates Act, 1877, and the Settled Land Act, 1882.
4. If he is ejected and his right of entry becomes barred by the Statute of Limitations, all the persons he could have barred are barred (3 & 4 Will. IV. c. 27, s. 21). Also if he dies before the expiration of the period limited for recovering any land or rent, no person whom he could have barred shall recover it but within the period during which he could have recovered it had he continued to live (s. 22).

   Thus if A is tenant for life, with remainder to his first and other sons in tail, and on his death a stranger enters, and his eldest son does not attempt to recover the property and dies after twelve years, his second son and the reversioners and remaindermen are all barred from recovering, for the eldest son could have defeated their interests.
5. If he becomes bankrupt his trustee in bankruptcy can bar the estate for the benefit of his creditors, to the same extent as he could have done. It is also liable for judgment debts.

CHAPTER III.

A LIFE ESTATE

Is an estate which is capable of enduring for a lifetime, but which may determine sooner. It may be created by (i) act of party; (ii) by act of law; (iii) implication of law.

(I.) Conventional life estates.

1. Estates for one's own life.

I. **Conventional.**—Created by act of party. [A life estate was the smallest estate which, in the early Norman times, a free man would accept. It was usually given for a man's natural life, otherwise it would terminate by his civil death, which might come to pass by his entering a monastery, or in several other ways. The distinction is rarely of any importance now. It was conferred by a "feoffment to A," the word "life" being unnecessary. This may appear to be an exception to the rule that every grant is construed most strongly against the grantor; for had that rule in this instance been complied with, the grantee would have taken it for his natural life, as that could not be shorter and might be longer than his civil life. But the reason is that in feudal times grants were not made for money but services, the grantor being then the stipulating party, as the grantee is now (being a purchaser for ready money), was considered not to intend to part with his estate for a longer time than he had expressed. In fact the grantor and grantee have now changed places. Also the Norman Sovereigns gave life estates for personal qualifications, and there was no reason that the heir should take anything unless specially mentioned.]

Incidents.

Incidents.—He cannot commit **waste** (*Birch-Wolfe* v. *Birch*, L. R. 9 Eq. 692) unless his estate is given to him without impeachment of or without being impleaded for

waste. Waste may be defined to be any permanent depreciation of the Inheritance. It is—

Waste.

1. **Voluntary.**—Opening mines, cutting **timber** (oak, ash, and elm, and in some places other trees as well), or even trees which are not timber, or in fact taking anything except reasonable estovers, or house bote and cart bote, as the Saxons called them, meaning necessary fuel for daily use and for the advantage of the estate. But he could dig mines already open. If he cuts down timber it should be sold, and the proceeds invested and accumulated for the benefit of the owner of the next vested estate of inheritance.

2. **Permissive.**—This is allowing the property to go to decay. Even before the ancient statutes of Marlbridge (52 Hen. III.) and Gloucester (6 Edw. I. c. 5), the tenant by curtesy or doweress was liable for waste of all kinds—these estates arising by act of law. Hence the law gave a remedy. But as to estates for life or years arising they did not, because the grantor could put such a clause into his grant. These statutes, however, forbade waste of any kind without licence. Lush, J., observes, in *Woodhouse* v. *Walker*, that the modern authorities on the subject of permissive waste appear to be strangely at conflict with the ancient statutes. [The better opinion has been that the tenant is liable when he has the legal (*Warren* v. *Rudall*, 1 J. & H. 1) but not when he has the equitable estate only (*Yellowby* v. *Gower*, 11 Exch. 274).] It has been recently held that an action for permissive waste will not lie against an equitable tenant for life, and it is very questionable whether it will lie against a legal tenant (*Barnes* v. *Downing*, 44 L. T. 809), unless there is a proviso to repair, as in *Woodhouse* v. *Walker*, L. R. 5 Q. B. D. 404, where an estate was devised by the testator to his wife for life for separate use, she keeping the premises in repair.[1]

[1] An action was brought against her executor by the immediate reversioner for repairs not done within six months

Waste might extend to the entire destruction of the property; no life tenant was intended to do this; therefore equity interfered and would not permit him to deface the mansion-house or ornamental grounds; the act of destroying them would be termed **equitable waste.** [The remedy at law was by writ of waste, which entailed the forfeiture of the place wasted.] 3 & 4 Will. IV. c. 27, abolished this, and now damages only can be obtained at law and in equity. In the latter court apprehended waste could always be staid by injunction, and since the Judicature Act of 1873, s. 24, the High Court of Justice has a similar power, and even before it could grant an injunction by 17 & 18 Vict. c. 125 (the Common Law Procedure Act of 1854), but not till an action had been commenced. The Judicature Act of 1873, s. 25, sub-s. 3, moreover provides that an estate for life without impeachment of waste shall not confer upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless such right shall appear by the instrument creating the estate.

Garth v. Cotton, 1 W. & T. Cas. p. 751.

36 & 37 Vict. c. 66.

40 & 41 Vict. c. 18, s. 16 (the Settled Estates Act of 1877), allows the Chancery Division to authorize a sale of any timber, except ornamental timber.

The Settled Land Act, 1882, s. 35, allows the tenant for life, by consent of the trustees or by order of Court, to cut and sell timber ripe and fit for cutting, three-fourths of the proceeds to be set apart as capital money, and the other fourth to go as rents and profits.

Although if a tenant for life cuts down trees they belong to the tenant of the first estate of inheritance in expectancy, yet if trees fall of their own accord the particular tenant may use them for rebuilding, repairing, &c.

Lewis Bowles' case, Tudor Cas. Pry. p. 27.

of death, under 3 & 4 Will. IV. c. 42, s. 2, this statute giving a right of action against the executor of a person deceased in respect of wrongs committed by the testator to another in respect of property. It was held, it lay at common law as it would have lain against the tenant for life in his lifetime.

The property in severed trees vests in the tenant for life, if without impeachment for waste.

To sum up—a **Summary.**

Tenant at sufferance, Bishop, parson, vicar, or other ecclesiastical person, Copyholder,	cannot commit any waste.
Tenant at will, Tenant for years not being bound to repair, Tenant for life if an equitable tenant; if a legal tenant the law is unsettled,	may not commit voluntary—but may commit permissive waste.
Tenant in tail after possibility of issue extinct, Tenant in fee subject to an executory devise over, Tenant for life without impeachment of waste,	can commit legal but not equitable waste.
Tenant in fee simple (unless he is a copyholder), Tenant in tail,	can commit any waste, and even a bond to restrain them from doing so is void.

[Originally a tenant for life could not make any lease for longer than his own life unless authorized to do so. This, however, was found inconvenient, and an Act was passed, now repealed (19 & 20 Vict. c. 120), to enable him to lease for twenty-one years under certain conditions.] The law is at present regulated by the Settled Estates Act, 1877, which in substance re-enacts the Act of 1856. It applies only to settlements made subsequently to 1856, and provides that— **Leases.** 40 & 41 Vict. c. 18.

A demise in England for twenty-one years and in Ireland for thirty-five years shall be good in the absence of provision to the contrary if—

1. Made by deed.

2. At the best obtainable rent, which must be incident to the immediate reversion.
3. Without any fine.
4. With impeachment for waste.
5. With a covenant for the payment of rent and such other usual and proper covenants as may seem good to the lessor.
6. With a condition of re-entry in not more than twenty-eight days.

The lease must take effect in a year from the making, and a counterpart must be executed, of which the execution of the original lease by the lessor is sufficient evidence. The mansion-house itself and grounds belonging cannot be leased under this Act. Also the Chancery Division may, on application, grant, subject to the Act—

An occupation lease for twenty-one years in England and thirty-five in Ireland, whatever may be the date of the settlement.

A mining lease for forty, a repairing lease for sixty, and a building lease for ninety-nine years, or even longer leases if it is the custom. In a mining, repairing, or building lease a peppercorn rent may be reserved for the first five years.

This Act also applies to leases made by tenants of Unsettled Estates, as tenants by the curtesy. The tenant for life may also lease under the Settled Land Act, as stated on p. 39. The points of difference between leasing under this Act and the Settled Estates Act, 1877, may be observed to be (i) that there is no mention of 35 years as to Ireland; (ii) that application to the Court is not required for leases over 21 years; (iii) there is no mention of a repairing lease.

Sale.

The Settled Estates Act, 1877, allows the Court to sanction any proceedings necessary for the protection of any settled estate and order the costs for such proceedings to be paid or raised out of the estate itself. It may also authorize a sale of any except ornamental timber—of

minerals without the surface (*Re Milward's Estate*, 6 Eq. 248)—and a sale of the whole estate itself if it thinks proper, in which case the money (which, until disposed of, is to be paid to trustees of whom the Court shall approve, or is invested by the Court) is applied to redeem incumbrances and then to purchase other estates, to be settled similarly, or to be paid to the persons absolutely entitled. The Court may direct that any part of a settled estate may be laid out in streets, squares, &c., either to be dedicated to the public or not (s. 20).

Any person beneficially entitled to a term for years determinable on death or to any greater estate, or the assignee of any such person, may petition the Court to exercise the powers conferred on it by the Act (s. 23)—such petition to be with the concurrence of all persons in existence and all trustees for unborn persons, having beneficial interests. But if there is a tenant in tail in existence, the consent of persons having interests subsequent to him is not required, provided he is *sui juris* (s. 24), and if he is an infant the Court has discretion to dispense with such consent (s. 29); the Court may also dispense with the consent of any person having regard to the number and interests of the persons assenting and dissenting (s. 28). Also an order may be made without consent but subject to the rights of any person whose consent the Court did not think fit to dispense with (s. 29). Where the Court does not dispense with a person's consent, it directs him to be served with a notice (unless he cannot be found, or it would be too expensive), requiring him to assent or not in a certain time, and if he does not do so he is deemed to have submitted (s. 26). The powers of the Act are not to be exercised if there is an express declaration to the contrary in the settlement (s. 38).

When **two or more estates** come into the possession of (i.) the **same person**; (ii.) in the **same right**; (iii.) the one **Merger.**

being **immediately**[1] **expectant** on the other—the former, (iv.) if smaller or equal in quantity, will merge or disappear in the latter. Therefore there are four conditions requisite to effect a merger. Thus a life estate will merge into a fee simple—or a term for years, however great, will merge into a life estate. Although the first estate must be smaller than, or equal to, the second in quantity, yet it may actually be more valuable or of longer duration in point of time. Thus if Dale is given to A for 1000 years, remainder to B for one year, and B devises to A, A's term will merge and he will hold Dale for one year only; but it must be remembered that any person, excepting the heir, can disclaim an estate disadvantageous to him.

Exceptions.

1. But the estates must come to the same person in the same right, not *in autre droit;* therefore if a termor makes the freeholder his executor there will be no merger. But this will not apply if he makes him the legatee of the term, for then he will get it in his own right after paying the debts. It will also merge if he purchases it. Again, before M. W. P. A., 1882, if the freehold came to the wife of a termor, there would be no merger, for he held it in right of his wife. J. A., 1873, s. 25, sub-s. 4, provides that there shall be no merger by operation of law of any estate of which the beneficial interest is not extinguished in equity. Hence the estate of a *cestui que trust* is unaffected by the legal estate of his trustee merging.

[1] But a vested remainder for years, interposed between the freehold (*secus* if between a term) and the inheritance, does not prevent their consolidation; because it is not an intervening portion of the seisin or ownership, but only confers a possessory right; and *a fortiori*, a mere *interesse termini* will not prevent merger. A contingent remainder prevents merger of the vested estates, if they are created by the same instrument, and also if it becomes united to the particular estates by act of law, as a descent; for *actio legis facit nemini injuriam* (Fearne, C. R. 345). Yet dower and curtesy will attach to the latter, it being considered an inheritance in possession to this extent.

2. An estate tail will not merge into a fee simple, for this would defeat the intention of De Donis.

3. A base fee will enlarge, not merge, into a fee simple, by 3 & 4 Will. IV. c. 74, s. 39.

4. Tithes do not merge of their own accord when the land and the tithes are united in the same person; neither does a franchise.

5. Easements do not merge on the union of the dominant and servient tenement, if

(1) They are easements of necessity; as a right of way which is the only access to the land.

(2) If apparent and continuous, as air and light.

Emblements.

Emblements are fruits of the earth reared by the toil of man, and mean the right to reap what one has sown. The tenant for life is entitled to the crops, unless his tenancy determines by his own act; and his representatives have this right on his death, for *actus Dei facit nemini injuriam.* Emblements do not include things of spontaneous growth, such as grass and clover.

2. Estates for another's life,—pur autre vie.

If A, tenant for life, grants to B, B will have a life estate if A survives him. This is smaller than an estate for a man's own life, for it may, coming to an end by the death of A, determine before B's death, while on the other hand it cannot last longer (*but see "General Occupancy," post*, Pt. 2, c. 8).

(II.) Life estates by act of law.

II. **Legal.**—Dower and curtesy and the right of the husband to receive the rents and profits of his wife's land during the coverture, are instances of these; they are created by act of law, and not by act of party, and sometimes, as in gavelkind lands, determine on re-marriage. The law permits no waste in these cases.

Requisites for dower.

Previously to the Dower Act the widow was entitled to dower out of all the lands of which the husband was,

1. **Solely** seised of an estate of inheritance,

2. **In possession**[1] at any time,
3. **During the coverture**,[2] and which
4. **Any issue she might have had** would have inherited, therefore the second wife would not have been entitled to dower out of lands which were given to the husband and his first wife in special tail.
5. **The husband being dead**;

The seisin in law of the husband was sufficient to entitle her to it, for she could not compel him to become seised in deed. It consisted of a life estate in a third of the property, and attached to all lands of the husband, excepting

1. Equitable estates.
2. When by the conveyance of exchange the husband took a new estate. Here she was put to her **election**; this being one of the few cases in which courts of law recognized that doctrine.
3. When the estate only remained in the husband for an instant; *e. g.*, if it was conveyed to him by a Recovery or Fine, and he immediately reconveyed, the whole proceeding was considered *in transitu*.

It also attached to several incorporeal hereditaments, as advowsons, titles, tithes, and rents. (Co. Litt. 32d.)

[As it was impossible for the husband to dispose of his estates free from dower, plans were invented to elude the law. The most ancient method on a purchase by the husband of an estate was to convey to the husband and his heirs to the use of the husband and a trustee and the heirs of the husband, at the same time declaring the trustee's estate to be only in trust for the husband and his heirs; the husband was seised jointly, and there was no dower unless the trustee happened to die. The next plan, **uses to bar dower**, defeated dower entirely. A power of appoint-

[1] See note on p. 38.

[2] Coverture is terminated by divorce, even though the wife is petitioner. *Frampton* v. *Stephens*, 21 Ch. D. 164.

ment was given to the husband (the purchaser), and in default of and until appointment, to the husband for life, and after any premature determination of his estate by forfeiture, surrender or merger, to a trustee and his heirs during the husband's life, remainder to the heirs and assigns of the husband for ever. The husband can never have an estate of inheritance in possession in this case, for the estate of the trustee obstructs the union of his life estate and the fee simple. Thirdly, a satisfied term attendant on the inheritance postponed dower till the term's expiration before the Satisfied Terms Act, 8 & 9 Vict. c. 112. Fourthly, jointure was an absolute bar if made before marriage, but if made after, the widow might elect. Before the Statute of Uses there was no dower or curtesy of a use, and it was therefore customary to settle some joint estate on the husband and wife for their lives.] By the Statute of Uses legal jointures were permitted, and a jointure to bar dower must be made—

1. To take effect immediately on the death of her husband.
2. For her own life at least—nothing less.
3. For herself, and not to anyone in trust for her.
4. In satisfaction of her whole, and not a portion of her dower.

Dower is more advantageous than jointure, in that it is not liable to tolls or taxes, nor even a debt due to the crown from the husband.

But jointure, on the other hand, is obtained at once; whereas dower has to be assigned. It was not forfeited for treason, like dower.

Since 3 & 4 Will. IV. c. 105, the widow's claim to dower is of a somewhat precarious nature; for any charge made by the husband, or any declaration by will or deed, will deprive her of it. In fact, she can only claim it against the heir on intestacy, and it therefore has become a portion

of the law of inheritance. But the Act extends it to lands to which he has a right, but not seisin, and also to equitable estates, but not to copyholds. Marriage settlements have for centuries past usually provided for the widow, and so the Act is not likely to work any injustice.

Curtesy. An estate by the curtesy of England is a life estate which is given to the husband out of his wife's estates of inheritance, of which she was,

Requisite for curtesy.

1. Seised **solely**, or as coparcener or tenant in common —in deed (seisin in law not being sufficient as in dower, as he could have compelled her to become seised in deed).
2. In possession.[1]
3. There having been **issue born alive** during the marriage, and capable of inheriting.
4. The marriage having been **legal**, and not avoided by a divorce.
5. The **wife being dead.**

(III.) Life estates by implication of law.

Curtesy extends to equitable[2] as well as legal estates. In gavelkind lands, it extends to half the land, and ceases if he marries again. In copyholds, it only exists if there is a special custom.

Gardner v. Sheldon, Tud. Conv. Cas.

If there is a devise to the testator's heir after the death of a third person and no residuary devise, such third person is said to have a life estate by **implication of law.**

[1] There is curtesy and also dower, however, of a reversion expectant on a term for years, because the wife is seised of the immediate freehold. Co. Litt. 29*d*.

[2] Decisions have varied as to whether it extends to property to which the wife is entitled for her separate use, but the question may now be considered as decided in the affirmative by *Eager* v. *Furnivall*, L. R. 17 Ch. D. 115, where A, who died in 1875, by his will, in 1872, gave freeholds to his daughter in fee to her separate use. She died in 1874, leaving her husband and a child surviving. Held, he was tenant by the curtesy.

Acts have been passed in the present reign to facilitate limited owners raising money to improve the settled lands, and to make the repayment a charge on the land. Thus by the Public Money Draining Acts (9 & 10 Vict. c. 101, and others), advances may be obtained from Government for draining, repayable by equal annual instalments not less than 12 or more than 18 in number, or in the case of buildings, not less than 15 or more than 25, such money with interest at 5 per cent. to be charged on the land. Improvement of land.

By the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), repealing the Private Money Drainage Act, 1849, money may be raised by way of rent-charge charged on the inheritance at 5 per cent. or less, repayable in 25 years—for draining, irrigating, clearing, reclaiming, planting, inclosing, constructing buildings or landing-places, or otherwise, as laid down in the Act. The application is made to the Land Commissioners, who may require security and cause the matter to be investigated and notices to be given.

By the Limited Owners Residence Act, 1870 (33 & 34 Vict. c. 56), and the Amending Act, 1871 (34 & 35 Vict. c. 84), the above is extended to the building and repairing of mansions as residences for themselves, but the sum charged must not exceed 2 years' net rental of the inheritance.

By the Limited Owners Reservoirs Act, 1877 (40 & 41 Vict. c. 31), the erection of reservoirs and other works is included.

The Settled Land Act, 1882.

The limited compass within which it is desired to continue each new edition of this work compels the remarks on this most important Act to be confined to its leading features only. It appears framed to give to the owner of an estate for the time being all the powers of dealing with the land which a prudent owner would desire to exercise. It makes compulsory—provisions which have been for a long The Settled Land Act, 1882, 45 & 46 Vict. c. 38.

time voluntarily inserted in most settlements, but transfers to life tenants the initiative, which has hitherto generally fallen to trustees—that is, dealing with the land; but there are precautions to prevent confiscation of interests and distribute fairly the benefits of the Act. These powers when given to trustees, were frequently, owing to timidity or want of interest, not exercised at all, and in hastily-drawn settlements were sometimes irregularly secured or even omitted altogether. Sometimes settlements contained provisions detrimental to the public interest. The object of the Act has been to discourage these. Considerable care has been bestowed in protecting the interests of the remainderman by placing restrictions upon the tenant for life's exercise of the powers conferred on him, and by securing for the benefit of the settlement the capital moneys arising. The object of the Act being to compel certain relaxations to tenants for life, any settlor may, if he pleases, confer the same or similar powers upon them on easier terms.

The powers given to trustees by settlors are unaffected, but no settlor can empower the trustees to execute any of the powers given by the Act without the consent of the tenant for life (58, ii); also the Act overrides settlements if inconsistent with its provisions. Thus, if a settlement forbids the sale of the mansion-house and heirlooms, it can still be done by leave of the Court (*Re Brown's Settled Estate*, 27 Ch. D. 179). It also overrides private Acts (*Re Clayton's Settled Estates*). Other Acts whose policy it has extended are—as far as leasing goes—the Settled Estates Act, 1877; and as far as improvements are concerned—the Improvement of Land Act, 1864. These Acts are not repealed but improved upon. The Act of 1864 entailed annoyance, expense, and responsibility, and was little used. The charges it created were a first charge on the land, the increased value of the security being the justification of this. The Settled Land Act allows no tampering with prior estates. Further, the means by

which the money may be raised are simpler, and the sources of employment more numerous, the conditions less onerous, and action may be taken, generally, without application to the commissioners or the Court.

Persons who are included in the expression "tenant for life," and who may exercise the powers of the Act.

The persons who may exercise the powers embrace—

1. Anyone beneficially entitled to the income for life.

2. Any tenant in tail—unless of land bought by money provided by Parliament in consideration of public services, and which he cannot bar.

3. A tenant in fee with an executory devise over in any event.

4. A tenant of a base fee, although the reversion is in the Crown.

5. A tenant for years determinable on life or pur autre vie, although the estates are determinable on any event.

6. A tenant in tail after possibility of issue extinct.

7. The trustees, or, if none, the person the Court appoints, if the tenant for life is an infant.

8. The committee of a lunatic, so found by inquisition.

9. A person entitled to the income of land under a trust for payment thereof to him during his own or any other life, whether subject to the expenses of management or not, or until sale, or until forfeiture on bankruptcy or any other event. *Re Jones*, 24 Ch. D. 583, has decided that the person entitled to the surplus income has this statutory power, although the whole income is exhausted by charges.

10. A tenant by the curtesy—his estate, by s. 8 of the Settled Land Act, 1884, is to be deemed to be arising under a settlement made by his wife.

The powers under the Act are—

The powers under the Act.

1. **Sale** of the whole or part of the property or easements, &c. relating to it, excluding the mansion-house or demesne lands for the sale of which an order of Court is necessary.

2. **Release of Tenure and Enfranchisement.**—Where the

settlement comprises a manor, the freehold seignory may be sold, or the freehold of any customary land, parcel of the manor, with or without the minerals, &c., so as to effect an enfranchisement.

3. **Exchange.**—Including an exchange in consideration of money paid for equality of exchange—that is, a purchase, in consideration partly of land and partly of money, s. 3 (3). But settled land in England cannot be exchanged for land out of it, s. 4 (8).

4. **Partition.**—Also consisting partly of money, s. 3 (4).

5. **Shifting of Incumbrances.**—With the consent of the incumbrancer an incumbrance may be charged on any other part of the land.

6. **Lease.**—The powers are similar to those in the Settled Estates Act, 1877, excepting that—

(1) There is no mention of 35 years for Ireland.
(2) Nor of a repairing lease.
(3) The consent of the Court is not required for building leases of 99 years, or mining leases for 60 years.
(4) The right of re-entry for non-payment of rent must be within 30 days.

7. **Confirmation of Contracts.**—A lease may be made:—

(i.) To confirm a contract made by a predecessor in title, where the lease, had he made it, would have bound his successors.
(ii.) To give effect to a covenant for renewal.
(iii.) To confirm previous void or voidable leases, provided every such lease, when confirmed, would have been one which might originally have been lawfully granted, s. 12 (3).

8. **Surrenders of Leases.**—Wholly or partially, s. 13.

9. **Licenses to Lease Copyholds.**—The tenant for life of the manor may license a copyholder to make such leases as the Act allows freeholders to grant.

10. **Appropriation of Streets, &c.**—In building leases and

sales, there may be requisitions to lay out for the benefit of the residents any parts for streets, drains, paving, and works necessary thereto, and arrangements for their repair and maintenance may be made.

11. **Timber.**—By consent of the trustees or an order of Court, the tenant for life, although impeachable for waste, may cut and sell "timber ripe and fit for cutting." Three-quarters of the proceeds to go as capital money and one-quarter as rents and profits (s. 35).

12. **Contracts.**—May be made, varied, or rescinded to carry out any of the purposes of the Act (s. 31).

13. **Heirlooms.**—By order of the Court, personal chattels, settled on trust, so as to devolve with land, may be sold (s. 37).

These powers are not capable of assignment or release (s. 50), nor can any attempt be made in a settlement to restrain him from exercising them, or to punish him by forfeiture for so doing.

Capital Money and its Application.

Capital money is only defined by the Act as follows :— **3. Capital money, what.**
Capital money arising under the Act, and receivable for the trusts and purposes of the settlement, is referred to as capital money under the Act. Therefore the decision of the question, what is capital and what is income, is left to the general law. Income generally includes casual profits accruing to the tenant for life, as the fines from copyholds, royalties on open mines in respect to minerals gotten, or fines and heriots paid on the renewal of leaseholds for lives.

How arising.—Capital money may arise under the Act from one or the other of the following sources. From

1. The sale of the settled land (3, i.).
2. The enfranchisement of a manor (3, ii.).
3. Money paid for equality of exchange or partition (3, iii., iv.).
4. A fine taken on the granting of a lease (7, ii.).

5. The proportion of a rent on a mining lease, set apart for the benefit of the inheritance (11).
6. Money paid as consideration for the surrender of a lease (13, i.).
7. The sale of the principal mansion-house (15).
8. Payments for the use of streets and open spaces (16).
9. Sale of mines and minerals (17, i.).
10. Money raised on mortgage for enfranchisement, or equality of exchange or partition (18).
11. Consideration money for rescission or variation of contracts (31, i.).
12. The three-fourths of the proceeds of sale of timber set apart for the benefit of the inheritance by a tenant for life, impeachable for waste (35, ii.).
13. Sale of heirlooms (27, i.).
14. Money in Court under the Lands Clauses Acts, or incorporating Acts, under the Settled Estates Act, 1877, or any other Act, or in the hands of trustees, and liable to be laid out in the purchase of land.
15. By the Settled Land Act, 1884, s. 1, is added a fine received on a grant of a lease under any power in the Settled Land Act, 1882.

In 5 and 12 above, the Act itself distinguishes between the amounts to be income and capital respectively, and 10, 11, 13, 14 above, are expressly declared to be capital money.

Application.

Application.—Capital money may be applied as follows:—

1. For investment in Government or other securities authorized by law or by the settlement, or bonds, mortgages, debentures, or debenture stock of any railway in the United Kingdom, incorporated by special Act, which has, for 10 years previously, paid a dividend on its ordinary stock (21, i.).

2. Discharge of incumbrances affecting the whole estate, or land-tax, tithe, rent-charge, or rent (ii.).

3. Payment for improvements under the Act. There are twenty of these, among them the following—Draining, irrigating, embanking, inclosing, making sea-walls, roads, labourers' cottages, farm houses, saw and other mills, reservoirs, tramways, railways, piers, markets, streets, squares, gardens, sewers, trial-pits, and other preliminary works in connection with the development of mines, and reconstruction or improvement of any of those works (25).

4. Payment of money for equality of exchange or partition (21, iv.).

5. Purchase of the seignory of any part of the settled land, being freehold (v.);

6. Or of the fee simple of any part of the settled land, being customary, that is, for enfranchisement;

7. Or of the reversion in fee on leaseholds for years, or life, or years determinable on life (vi.);

8. Or of land, freehold or copyhold in fee, or on lease with not less than sixty years unexpired, with or without minerals, and subject or not to exception of mines and mining rights (vii.);

9. Or (in fee or for a term of not less than 60 years to run), of mines convenient to be worked with the land, or of easements convenient for mining purposes (viii.).

10. Payment to any person absolutely entitled or empowered to give an absolute discharge (ix.).

11. Payment of expenses incident to the exercise of any of the powers or provisions of the Act (x.).

12. In any other mode in which money produced by exercising a power of sale under the settlement is applicable thereunder (xi.).

Capital money arising from settled land in England may not be applied in purchase of land out of it, unless authorized by the settlement (23).

The proceeds of the sale of heirlooming chattels (37) are

to devolve with the land, and may be treated as ordinary capital money, or may (by order of Court) be invested in the purchase of other similar chattels to be similarly settled.

13. In defraying any expenses directed by the Court to be paid out of the settled property (47)—this is probably sanctioned by 11, *supra*.

Protection to the Tenants in Expectancy.

1. When a sale, exchange, partition, lease, mortgage or charge is about to be made,[1] a month's notice must be given to each of the trustees of the settlement, and also to the solicitor for the trustees, if known (45, i.). If there are no trustees, they must be appointed for this purpose (*Wheelwright* v. *Walker*, 23 Ch. D. 752). The tenant for life will not be appointed trustee (*Re Harrop's Trusts*, 24 Ch. D. 717), nor his solicitor (*Re Walker's Trusts*, 48 L. T., N. S. 632). By the Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 5, the notice of intention to make a sale, exchange, partition, or lease (but not of the other powers), may be a notice of general intention as to contemplated action, and when requested, the tenant for life must furnish the trustee with particulars as to any of these acts in progress.

Trustees for the purposes of the Act.

The only definition the Act gives is, that the persons, if any, who are for the time being under a settlement trustees with power of sale of settled land, or with power of consent to a sale, or if there are no such persons, then the persons who are by the settlement declared to be trustees for the purposes of this Act.

Re Harrop's Trusts, 48 L. T., N. S. 937, has decided that neither the tenant for life—nor his solicitor (*Re Walker's Trusts*, 48 L. T., N. S. 632), can be appointed trustees for the purpose of receiving notice.

The existing trustees under a will are appointed, if

[1] No notice is required for exercising the other powers under the Act.

willing to act, on affidavit of fitness (*Re Wells*, 48 L. T., N. S. 859).

The Amending Act, 1884 (s. 1) allows the trustees by writing to waive notice or accept less than a month's notice.[1]

At the date of the notice the trustees shall not, subject to contrary intention in the settlement, be less than two (45, ii.). A person dealing in good faith with the tenant for life need not inquire as to the giving of the notice (44, iii.).

Consent of trustees required.

The trustees cannot veto the power of the tenant for life to exercise the powers of the Act; but their consent is required

(1.) To sell or lease the principal mansion or park (15).

(2.) For an improvement scheme where the money to be applied is in their hands (26, ii.).

(3.) For the cutting and sale of ripe timber where the tenant for life is impeachable for waste (35, i.).

They are under no liability for giving or withholding their consent (42).

The trustees only have the management of the estate where an infant is entitled to the settled land (60). They have discretion as to the application of money paid to them in respect to a lease or a reversion (34), but otherwise as to investing money (22), or re-investing in land (31), they are subject to the direction of the tenant for life, and need not even inquire into the propriety of the purchase.

Consent of Court.

Application to the Court must be made for—

(i.) Granting building or mining leases for a longer term than authorized by s. 10.

(ii.) Application of money paid into Court under the Act (22, i.); the trustees or tenant for life may make the application.

(iii.) Execution of an improvement scheme where the

[1] There is nothing said in this Act as to notice to the trustees' solicitor.

money is in Court (26, iii.), and nomination of an engineer to certify to such scheme.

(iv.) Sale or purchase of heirlooming chattels (37).

(v.) Application of money paid into Court in respect of a lease or a reversion (35).

(vi.) Appointment of a person to exercise the powers of the tenants for life on behalf of an infant, there being no trustees of the settlement (60).

(vii.) Authority to the committee of a lunatic to execute the powers of the Act (62).

2. Also if any differences arise between the trustees and the tenant for life as to the exercise of powers under the Act, the Court decides (44).

Application to the Court to be made either by petition or summons at chambers (46, iii.).

3. At the option of the tenant for life, capital money may be paid to the trustees or into Court (22, i.). By authorization of the settlement one trustee may receive it, otherwise it must be paid to two (39, i.).

4. The tenant for life and each of his successors are under the responsibility of maintaining improvements, and must also keep up insurances, as long as the Land Commissioners shall prescribe. Trees planted for improvement must not be cut down except for proper thinning.

The tenant for life, in the exercise of any power under the Act, shall be deemed to have the responsibilities of a trustee for those entitled under the settlement (53).

5. If capital money is in the hands of trustees, improvements must be executed under a scheme approved of by them, and an order of Court is necessary, or a certificate of the due execution of the work must be given, either by the Land Commissioners[1] or by a competent engineer or surveyor, nominated by the trustees and

[1] The Tithe, Copyhold and Inclosure Commissioners now form the Land Commissioners (48).

approved of by the commissioners or the Court, before the money is paid out of their hands. If the money is in Court, the Court's discretion guides its application (s. 26).

The Settled Land Act, 1884, s. 6 (1), provides that—in the case of land subject to a trust for sale, the proceeds, or the income thereof, to go to one or more for life or a limited period (Principal Act, 1882, s. 63)—the consent of the beneficiaries is not necessary for the sale. 47 & 48 Vict. c. 18.

In such a settlement s. 63 (2) of the Principal Act allows the tenant for life to exercise the powers of the Act without the consent of the trustees; but s. 7 of the Amending Act of 1884 only allows them to do so subject to the leave of the Court and some other restrictions.

Sect. 6 (11) provides that in any other settlement than the above if two or more persons are tenants for life the consent of one of these only is necessary for the exercise by the trustees of any power under the settlement for any purpose under the Principal Act (s. 56 of the Principal Act required the consent of all, which might be inconvenient).

CHAPTER IV.

ESTATES ON CONDITION.

WHENEVER property is limited by any means in such a manner that on the happening of any event, other than the natural determination of an estate, the interest of any person is to determine, or any interest to arise, the happening of the event is called **a condition.**

Conditions are—

1. Implied. 1. **Implied.**—Where an estate has any condition annexed to it inseparable from its essence and constitution, the condition need not be expressed in words. Thus if a grant of an "office" is made to A, the law annexes a tacit condition that he will perform the duties of the office; or if the franchise of a ferry is given to A, it is implied that A must always be ready to take people across the river, and have suitable accommodation for them. [Also **tortious conveyances** were a breach of condition and worked a forfeiture, for it was implied that a man should not attempt to give a greater estate than he had. For suppose A, tenant for life, enfeoffed B in fee, this was called a feoffment by wrong, and was a forfeiture to the remainderman. Besides a feoffment, a Fine and Recovery had a tortious operation. The rest were innocent conveyances, and a grant of more than a person had would merely be of no effect.] 8 & 9 Vict. c. 106, s. 3, did away with the tortious operation of a feoffment. If a person leases lands in which he has **no interest,** he is considered to contract that if he ever gets the lands he will put the lessee in possession, and both are **estopped** or prevented from denying the validity of the lease. But if the lessor has some interest, the lessee takes only as much as the lessor can give him, although a longer term is purported to be given, and he will never get any more, although a larger estate subsequently comes into the possession of the lessor, for a lease like the others is an innocent conveyance. But if the lease is for value, equity will com-

pel the lessor to make the term good out of the subsequent interest he has acquired.

2. **Express.**—Express conditions are of two kinds:— **2. Express.**

I. Conditions in deed. These are either— **I. In deed.**

1. **Precedent**—as "Grant Dale to A, if he goes to York." Here he will not get Dale till he has been to York. If the condition is impossible or repugnant the estate is void.
2. **Subsequent**—as "Grant Dale to A and his heirs at 100*l.* a year; and if the rent is not paid, the grantor and his heirs can re-enter and take possession." If the condition is repugnant it alone is void, and the estate becomes absolute.

II. **Conditional Limitations**—as "Grant Blackacre to A and his heirs, tenants of the manor of Dale." Here, as long as A and his heirs continue tenants of the manor of Dale, they will possess Blackacre; or "Grant 50*l.* a year to A and the heirs of his body." This is a fee simple conditional at the common law, as a personal annuity is an incorporeal hereditament, but not a tenement, and therefore does not fall within De Donis. Another example may be found in a base fee or any fee with a qualification annexed to it. A conditional limitation has the same effect as a shifting or springing use, and was always permitted at common law. (*Bradley* v. *Peixeto*, Tudor, Cas. Pry. p. 858.) This class embraces all base fees and fees simple conditional at the common law. Thus a feoffment to A and the heirs of his body until C returns from Rome, and then to B and his heirs, was always good; because when C returned from Rome A's estate determined of its own accord. But suppose it had been in this form, "Feoffment to A and the heirs of his body on condition that if C returns from Rome it is to go to B and his heirs," it would have been a condition subsequent and bad, because the grantor and his heirs would have to enter to determine the estate (Co. Litt. 214 b.), as at common **II. Conditional Limitations.**

law it was a rule that only the grantor or his heirs could take advantage of a condition, which entry would defeat the remainder; however this class of limitation can take effect by means of the Statute of Uses. But it must be borne in mind that the rule against perpetuities must not be transgressed; thus if "C and his heirs" was substituted for C in the above, it might exceed it, and could not be upheld.

By breach of condition a person may defeat the interests of others as well as his own. Thus where there was a devise to A for life, remainder to his issue in tail, remainders over, but a proviso that the gift to himself and his issue should be void if he married a domestic servant; on such a union the entail to his issue failed as well as his own interest. (*Jenner* v. *Turner*, 29 W. R. 99.) [Formerly also a person by prematurely determining a particular estate could defeat the contingent remainders upon it (see *post*, c. 8)].

A condition is **repugnant** if against the nature of the estate, as giving a man a fee simple on condition that he shall not alienate it, for alienation is an inseparable incident; or that the widow shall not have dower or the husband curtesy, or that a tenant in tail shall not suffer a recovery; but partial restraints are good, as not to aliene for a limited time or in mortmain. Also a direction that rents should never be raised would be bad, but that certain tenancies shall continue at the same rent would be good.

Elegit. **Other estates on condition.**—1. An estate of **elegit**, which is a personal estate only, for the creditor primarily requires his money, and merely takes the land because he cannot get it; therefore it would be unfair that what he wishes to be personal should devolve at his death as real property.

[2. **Statutes merchant and statutes staple**, now long obsolete, were securities for debts acknowledged to be due and only allowed by the law merchant for the benefit of

traders, who were favoured from early times; the creditor could hold the debtor's land till he paid.]

[3. Land held in **vadio gage or pledge.** The vivum vadium, where the borrower granted the lender an estate to hold till he was paid out of the profits, is a thing of the past, and] there remains only the mortuum vadium or **mortgage**, in which a great portion of the lands of England are held. The land is conveyed to the creditor for a sum of money, and in the deed there is a condition that if the money is repaid at a certain time the grantor shall re-enter, or, as is now more usual, that the mortgagee shall reconvey. If not, the grantee's estate becomes absolute at law; but equity, considering this unjust, for centuries past has allowed the grantor to get back the estate on subsequent payment. This is called his **Equity of Redemption.** Equity considers that the grantee holds the property merely as a lien for the debt, which is a specialty debt, and it is the practice for the mortgagor in the deed to covenant to repay. This right to redeem is inseparable from every mortgage, and any covenant that it shall not be exercised is void *ab initio*, the maxim being, "Once a mortgage always a mortgage." It is a redeemable estate, and no convention can make it otherwise. But still the mortgagor and his heirs have not the right of redeeming for ever, for this would undo all the laws against remoteness and make lands unsaleable. [Therefore his power of redemption was barred by 3 & 4 Will. IV. c. 27, s. 28, after twenty years from the time in which the mortgagee took possession (which equity never prevented his doing when the day for repayment had passed), unless there had been some part of the principal or interest on it paid in the meanwhile, or some written acknowledgment of the mortgagor's title signed by the mortgagee; if so his right to redeem was not barred until after twenty years from such acknowledgment or payment.] But the Limitation Act of 1874, 37 & 38 Vict. c. 57, s. 7 (see *post*, Pt. 2, c. 8),

Legal mortgages.

Equity of redemption.

Howard v. Harris, 2 W. & T. Cas. p. 1058.

substitutes twelve years for twenty. There is no extension for disability as in s. 3 of the same Act. (*Foster* v. *Patterson*, 29 W. R. 463.)

Foreclosure. The mortgagee may also bring an action of **foreclosure** in any time within twelve (formerly twenty) years from the accrual of the right or of the last payment, in which action judgment will be given, to take an account of what is due to the plaintiff for principal, interest, and costs; and on the defendant paying them on the day named, the plaintiff must reconvey and deliver up the deeds to him. In default of his paying he is to stand foreclosed for ever of all right of redemption in the mortgaged premises. If the mortgagor is in possession, an action for the recovery of the land must be brought to recover the possession (unless the mortgagee adds a claim for the recovery of the possession), as a foreclosure decree bars the equity of redemption and nothing more, not being an action for the recovery of the land. (*Wood* v. *Heather*, 22 Ch. D. 281.)[1]

A mortgagee suing in twelve years after foreclosure decree to recover possession is not barred by the Statute of Limitations, although more than twelve years have passed since the legal estate has been conveyed to the mortgagee, and since the last payment of any principal or interest. (*Pugh* v. *Heath*, 30 W. R. 553.)

Annual rests. The account will be directed to be taken with **annual rests** (which means striking a balance at the end of each year, when the mortgagee is in possession, there having been no necessity for his taking possession; and if the rents have come to more than the interest, the surplus goes to sink the principal; but if the rents are less than the interest, the surplus is added to the principal)—if there was

[1] A mortgagee may debar himself of his right of foreclosure for a given period by agreement; and during that time he cannot redeem a prior mortgage —because he has no right to redeem a prior mortgage without praying a foreclosure against the mortgagor (*Ramsbottom* v. *Wallis*, Coote, 5th ed. Mtg. App. 502).

no interest in arrear when he entered into possession, or if the property was not then going to decay or was insured, or, in fact, whenever it seems advisable to the Court to do so.

A third remedy of the mortgagee to terminate the matter, and one more frequently resorted to, is selling the property—powers of sale being frequently inserted in mortgage deeds.

Powers incident to mortgages.

Further, by the Conveyancing Act, 1881, ss. 19—24,[1] subject to contrary intention incident to every mortgage made by deed, there shall be a power to (1) sell, (2) insure, (3) appoint a receiver, (4) cut timber; the power of sale arising three months after notice to pay the principal on default of doing so, or after two months' default in payment of interest, or on breach by the mortgagor of any other provision. The mortgagee can only sell such interest as is

[1] [By the Chancery Procedure Act (15 & 16 Vict. c. 86, s. 48), now repealed by the Conveyancing Act, 1881, and replaced by similar provisions by s. 25 (see next page), the Court could always direct a sale instead of a foreclosure. Also, by 23 & 24 Vict. c. 145, ss. 11—24, also repealed—

1. A power of sale after six months' notice in writing;
2. A power to insure against fire;
3. A power to appoint a receiver of the rents;

was implied in every mortgage unless there was a declaration to the contrary, if—

1. The principal was in arrear one year; or
2. The interest in arrear six months; or
3. The payment of any insurance had been neglected.]

The heads of an ordinary power of sale it has been customary to insert in a mortgage deed are as follows;—

"If default is made in the payment, the mortgagee, his executors, &c., may sell by public auction or private contract, together or in lots, with or without special conditions as to title, with power to buy in and rescind contracts, and resell without being answerable for loss, &c."

Then follow statements as to when the power of sale is to be exercised:—

"Purchaser not bound to inquire as to the propriety of the sale, and the power may be exercised by any person entitled to give a receipt for the mortgage money. Mortgagee to reimburse himself, and hold surplus in trust for the mortgagor, &c."

In a mortgage of leaseholds by way of underlease a clause is inserted that after the sale the last day of the term is to be held in trust for the purchaser.

subject to the mortgage, and not the whole estate; but under an improper exercise of the power of sale, the title of the purchaser is good, and the mortgagor has only a remedy in damage against the mortgagee. But a mortgagee may exercise his power of sale even disadvantageously, as he is only a trustee for the mortgagor as to the balance. (*Warner* v. *Jacob*, 20 Ch. D. 220.) The amount of insurance must not exceed the amount specified in the mortgage deed, or two-thirds of the value of the property if there is no amount fixed. The mortgagee has an option of having the insurance money applied in restoring the premises or in discharge of the mortgage. A receiver can only be appointed by a mortgagee who is entitled to sell. He is to be deemed the agent of the mortgagee, and he is bound to insure if directed. A person paying money to him need not inquire if he is properly appointed; he is to apply the money after paying the interest on the mortgage and other outgoings to the person who, but for his possession, would be entitled to the rental profits. By these changes the principal objections to the use of the statutory power of sale in Lord Cranworth's Act, cited below, are removed, and the hardship to the mortgagor by the appointment of a receiver is obviated by having first to serve him with a notice as in a sale. These powers apply equally to all mortgaged property, not merely realty.

By s. 25, acting retrospectively, the Court may now order a sale in a foreclosure or redemption action, and also authorize the bringing of actions for the sole purpose of procuring a sale. The power is exerciseable in spite of the non-appearance or dissent of the mortgagor or mortgagee, and without previously determining the priority of incumbrancers, and may be made summarily or on such terms as the Court may think fit. The conduct of the sale in a redemption suit may be given to the defendant with special directions as to costs.

Foreclosure decree.

The form of a foreclosure decree runs as follows:—

"Let an account be taken of what is due to the plaintiff

for principal, interest and costs, and if the defendant does not pay in six months he is to stand for ever foreclosed."

The form of a redemption decree is the same as that for foreclosure, merely substituting plaintiff for defendant, and *vice versâ*. This equity of redemption is an estate, and is descendible and devisable like any other. Formerly, if the mortgagor died intestate and without heirs, the mortgagee held the land against the Crown or lord; but now, by 47 & 48 Vict. c. 71, s. 4 (see *post*, Pt. 2, c. 9), it will escheat. (Seton, 3rd ed. p. 1035; *Casborne* v. *Scarfe*, 1 Atk. 603.) The persons who beside the mortgagor are permitted to redeem are (see 2 W. & T. Cas. p. 1079)—

Who can redeem.

1. The heir or devisee or assignee.
2. A tenant for life, reversioner, remainderman, doweress, jointress, or tenant by the curtesy.
3. A subsequent mortgagee making the mortgagor a party.
4. A judgment creditor who has issued execution (*Mildred* v. *Austin*, L. R. 8 Eq. 223), *secus* before execution (*E. Cork* v. *Russell*, L. R. 13 Eq. 210), or the Crown or its grantee or lord, or even a volunteer, though his title is bad under 27 Eliz. c. 4, as against the mortgagee *quoad* his mortgage, and also persons entitled in default of appointment, where a mortgage is made in execution of a power.

There is no redemption before the time appointed in the mortgage deed for repayment (*Brown* v. *Cole*, 14 Sim. 427), and if the mortgagor does not repay then he must always give six months' notice, and pay directly they have expired, or else the mortgagee can demand six more. This is to give him time to look out for another investment.

Mortgagee in possession.

The mortgagee can eject the mortgagor when the day for repayment is passed, and he then becomes legal owner. But he is accountable for the rents, even though he has assigned the property to another, for he should see in

whose hands the estate is placed. He need only take ordinary care of the property, and is not bound to turn it to the best advantage, for it is through the laches of the mortgagor that he ever became possessed of it at all, and therefore it would be absurd that he should exert himself for the benefit of another, especially as he cannot even charge for personal trouble. Any outlay made by him on permanent improvements will be allowed, whether the mortgagor had notice of them or not (*Shepard* v. *Jones*, 21 Ch. D. 469). [His leases formerly were not binding on the mortgagor nor those of the mortgagor upon him.] The Act 1881, s. 18, allows, subject to contrary intention, under future mortgages, the mortgagor or mortgagee, while in possession to make agricultural or occupation leases for 21 years or less, and building leases for 99 years or less, to take effect in 12 months from date, to be at the best rent, without fine, with a covenant for payment of rent and a clause for re-entry on non-payment within 30 days, and a counterpart to be executed by the lessee and delivered to the lessor. These powers somewhat resemble those given to limited owners under the Settled Estates Act (see p. 25), except that the lease here need not be by deed or even written, and a mining lease is not included.

The mortgagee cannot become the lessee of the mortgagor, or the mortgagor, being in his power, could thus be compelled to lease to him on what terms he thinks fit. If an advowson be in mortgage, the mortgagor, and not the mortgagee, presents, and no agreement to the contrary will be of any avail. The Judicature Act of 1873, s. 25, sub-s. 5, has enacted that the mortgagor, entitled to the possession or receipt of the rents of land as to which no notice of his intention to take possession has been given by the mortgagee, may sue for the rent or possession in his own name only, unless the cause of action arises on a lease or a contract made by him jointly with another person.

36 & 37 Vict. c. 66.

Although the mortgagee need not turn the property to the best advantage, yet he must account for every profit he has made; he must bear speculative losses, and keep the accounts, so as to be ready to be produced when demanded. If the security is deficient he may work mines on the estate, but not otherwise; he may distrain to recover rents from tenants who were let in before the mortgage, but not from those that the mortgagor has leased to subsequently.

Attornment clause.

The mortgagor may become tenant to the mortgagee; this is effected by the **Attornment Clause** in a mortgage deed. It is usually at a rent equal to the interest on the mortgage, and done with a view to give the mortgagee a power of distress on default of payment. A mere power of distress without attornment is not effectual, as the mortgagor, having no estate at law, cannot create a legal rent-charge with a power of distress, and the power would only operate as a licence. (*Freeman* v. *Edwards*, 2 Ex. R. 732.) An attornment by a mortgagor to a second mortgagee is valid, although he may have already attorned to the first mortgagee. (*Ex parte Punnett*, 16 Ch. D. 227.) The Bills of Sale Act, 1878, s. 6, provides that every attornment must be registered as a bill of sale, unless occurring where the mortgagee, being in possession, has demised to the mortgagor a fair rent.

It has been decided that the fact that a mortgage contains an attornment clause does not render the mortgagee liable to be treated as a mortgagee in possession, and thus compelled to give an account to a subsequent mortgagee, unless he has actually distrained or taken possession. (*Harlock* v. *Ashberry*, 9 Ch. D. 539; *Stanley* v. *Grundy*, 22 Ch. D. 478.)

By the Conveyancing Act, 1881, s. 16, applying to all mortgages, and taking effect in spite of contrary intention, the mortgagor, on payment of costs occasioned, may from time to time, and in spite of any stipulation to the contrary,

inspect and make copies or abstracts of, or extracts from, the title deeds.

Covenant to repay. The debt is often secured by covenant and bond as well as mortgage, in which case the mortgagee will have several remedies, and he may pursue them all at the same time. Also if he cannot get full payment on the one he may commence the other; but if he obtains full payment by the bond the mortgagor is by that fact at once entitled to redeem, or if he obtains it by foreclosing he must deliver up the bond. But if the foreclosure does not fully repay him the principal and interest advanced, he can still sue on the bond, but by so doing he will reopen the foreclosure suit—that is, again give the mortgagor the opportunity to redeem; therefore he must not have parted with the estate, or he will not be permitted to sue on the bond. If he has a power of sale and sells, he can still sue on his covenant. (*Folkhard* v. *Hardy*, 9 Beav. 349.) The covenant to repay must be sued upon in 12 years (*Sutton* v. *Sutton*, 52 L. J., Ch. 333), even though contained in a collateral instrument. (*Fernside* v. *Flint*, 52 L. J., Ch. 479.)

Interest reserved. Any rate of interest may be reserved, but no agreement will be good that in the event of delay in payment a higher rate shall be charged, it being considered too great a hardship on the mortgagor; but a stipulation that a lower rate shall be substituted for punctuality of payment is approved of by the Courts.

Assignment of the mortgage. By the Conveyancing Act, 1881, s. 15 (operating retrospectively and taking effect in spite of contrary stipulation), when the mortgagor is entitled to redeem he may require the mortgagee (unless in possession) to assign the debt and convey the debt to a third person. Before this Act no mortgagee could be compelled to put another person in place. (*James* v. *Bion*, 3 Sm. 234.) By the Conveyancing Act, 1882, s. 12, this right shall be enforceable by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition by an in-

cumbrancer shall prevail over one by the mortgagor, and one by a prior over one by a subsequent incumbrancer.

The mortgagee may in his turn wish to assign or mortgage the mortgage debt. The form of such a mortgage is as follows. The deed states the date and parties, and then recites the mortgage, mentioning how much principal and interest is owing, and the agreement. It then witnesses that in consideration of the sum of £——— (the receipt of which the mortgagee acknowledges) the mortgagee covenants to pay the principal and interest, and as beneficial owner assigns the mortgage debt to the sub-mortgagee—with full power to demand the principal and interest—and further conveys the mortgage premises in fee simple to hold subject to the proviso for redemption, and there is finally a provision for the indemnity of the sub-mortgagee. (Prid. Conv. 12 ed. 563.)

Sale with option of repurchase.

It is sometimes difficult to ascertain whether a transaction is a mortgage or a sale with option of repurchase in a stipulated time. The best tests are—

1. Is the money inadequate?
2. Did the vendor retain possession?
3. Did the vendee account for the rents, if in possession?
4. Who bore the expense—did the vendor?
5. Did the vendor give absolute covenants?

If these questions, any or all, are answered in the affirmative, the probability is that it is a mortgage. Each point has its weight, and parol evidence on the subject is admitted. The consequences are important, for in a sale—

1. The right of repurchase must be exercised at the time specified, or else it is lost for ever.
2. If the purchaser die before it is exercised the money will be paid to his real and not to his personal representatives as in the case of a mortgage.

2 W. & T. Cas. p. 1046.

[It was decided, in *Thornborough* v. *Baker*, that the heir of the mortgagee must reconvey, as the legal estate had descended to him—a most inconvenient doctrine, considering he would take, as heir, no part of the money; but this was altered by 37 & 38 Vict. c. 78, s. 4, which enacted that in such an event the legal personal representative of the deceased *might* reconvey on payment of all sums secured on the mortgage.] The Act, 1881, s. 30, repeals this, and trust and mortgage estates devolve on the personal representatives of the deceased.

Huntingdon *v.* Huntingdon, 2 W. & T. Cas. p. 1032.

If the wife's estate is mortgaged, and the equity of redemption is reserved to the husband and his heirs, yet equity considers that they hold it in trust for the wife and her heirs, and that they shall redeem; but if there is a plain intention not to consider her in the light of a surety and to alter the limitation of the estate it will not interfere.

Mortgage of leaseholds.

Leaseholds are usually mortgaged by underlease, otherwise the mortgagee will become liable for the covenants entered into by the lessee with the landlord; by underlease he becomes the mortgagor's tenant, and is free from them; but, if desired, a leasehold may be mortgaged by an assignment. The same doctrines and statutes which apply to mortgages of freeholds also apply to them. Further, if in the leasehold there is a clause of forfeiture on assignment, such condition will not be broken by mortgaging by underlease. (*Crusoe* v. *Bugbie*, 3 Wils. 235.)

A mortgage by underlease is usually for the whole term *minus* one day, there being a provision that as to that day the mortgagor shall be trustee for the mortgagee, because, in renewable leaseholds, otherwise the mortgagor would get the benefit of the renewal.

37 & 38 Vict. c. 78.

[Before the Vendor and Purchaser Act of 1874, it was often found convenient to take a mortgage of fee simple

lands by way of a long term for years instead of a fee simple, owing to the inconvenience of obliging the heir to reconvey when the money was paid off. The fourth section of the Act (now repealed, see previous page), as just remarked, first remedied this by enabling the personal representative to do so.]

The fund primarily liable to pay a mortgage debt is (since Locke King's Act, 17 & 18 Vict. c. 113) the estate itself, unless a contrary intention is manifested by will or other document; which means a direction to pay it from some other source. [It was held in several cases that any direction to pay debts out of personal estate provided a fund for the payment of mortgage, as well as of other debts; as bequeathing the personal estate on trust or subject to pay debts. (*Moore* v. *Moore*, 1 De G. Jo. & Sm. 602; *Mellish* v. *Valins*, 2 J. & H. 194.)] **Locke King's Act.**

Before the Act, and in cases which do not fall within the Act, the personalty is the primary fund, unless— **Ancaster v. Mayer, 1 W. & T. Cas. p. 681.**

1. The mortgaged estate was devised *cum onere;* or
2. The debt was created by the ancestor of the testator and he has not adopted it as his own.

Copyholds and equitable mortgages were held to be within the Act [but not leaseholds; neither was the **vendor's lien** for unpaid purchase-money]; but 30 & 31 Vict. c. 69, s. 2, altered the law on this point, enacting that the term mortgage should embrace a vendor's lien on property purchased by a testator (not intestate), and also (s. 1) that a general direction that the debts of the testator shall be paid out of his personal estate should not be deemed a "contrary intention," so as to take the case out of the statute, unless such intention was further declared expressly or by implication.[1]

Lastly, 40 & 41 Vict. c. 34, extends Locke King's Act

[1] Thus reversing the cases cited above.

to a lien for unpaid purchase-money when the purchaser has died intestate, and also to hereditaments of whatever tenure (therefore leaseholds are now included), unless there is a contrary intention expressed by a testator (not intestate); but a charge or direction to pay debts out of residuary realty and (or) personalty is not to be deemed a contrary intention.

These Acts are not retrospective, and therefore only apply to the case of persons dying after they come into force.

Summary of the Remedies of Mortgagees.

A legal mortgagee may
- Take possession.
- Foreclose.
- Sue on his covenant.

An equitable mortgagee may
- Bring an action for money lent.
- Foreclose (this is the proper remedy; *James* v. *James*, 21 W. R. 522), or sell at his election (*York Union Banking Co.* v. *Hartley*, L. R. 11 Ch. D. 205), if his equitable mortgage by deposit is accompanied by an agreement to execute a legal mortgage, but a depositee without a written memorandum should foreclose, not sell (*Backhouse* v. *Charlton*, L. R. 8 Ch. D. 444); but if the equitable security is a mere charge or lien on the estate, the proper remedy is sale. *Oldham* v. *Stringer*, W. N. 1884, 235, has decided that the Court has power to order a sale under the Conveyancing Act, 1881, s. 25, in a foreclosure action brought by an equitable mortgagee, whether accompanied by an agreement to execute a legal mortgage or not.
- Obtain a receiver, if the Court thinks fit. (J. A. 1873, s. 25, sub-s. 8. See *Curling* v. *Lord Leycester*, 19 Ves. 653.)

Also by the Conveyancing Act, 1881, every mortgagee by deed has a power—

- To sell and convey with a trust for the application of the purchase-money (ss. 19, 21).
- To insure, with rights over the application of the insurance-money (ss. 19, 23).
- To appoint and remove a receiver (ss. 19, 24).
- To give receipts for moneys received under the mortgage (s. 22).

And if in possession a further power—

- To cut and sell timber (s. 19).
- To grant agricultural or occupation leases for twenty-one years, and building leases for ninety-nine years, and otherwise to let (s. 18).
- To make agreements for such leases (s. 18).
- To sue for the title deeds, as they follow the legal estate (see Coote, 5th ed. 340, 926).

Equitable mortgages. Russel v. Russel, 1 W. & T. Cas. p. 726.

Equitable Mortgages.—When the legal estate is not conveyed to a person as above narrated, his claim is not recognized at law. Often there are several mortgages on a property, and as the legal estate can only be conveyed to one, it follows that the others are equitable mortgagees. Although by s. 4 of the Statute of Frauds, every contract for the sale of lands must be in writing, yet equity considers that the deposit of the title deeds of an estate is sufficient evidence of an agreement for a mortgage, and allows such a deposit for the purposes of creating a legal mortgage to constitute a valid equitable one; any such deposit will also extend to future advances if such be the intention at the time. But the mortgagee cannot safely make further advances if he has notice of an intervening mortgage[1] (*Rolt* v. *Hopkinson*, 9 H. L. Cas. 514, overruling *Gordon* v. *Graham*, 7 Vin. Ab. 82, pl. 7), also a

[1] This doctrine applies the same, whether the first mortgage is a legal or an equitable one.

verbal agreement to deposit title deeds does not create a valid equitable mortgage but a written agreement does; the deeds must themselves be deposited, not necessarily all, but some of them.

If a legal mortgage is made after an equitable one the legal mortgagee will be paid first, for where equities are equal the law will prevail unless he has been guilty of some gross negligence, such as omitting to inquire after the deeds when the conveyance was made to him; but if he inquired and a reasonable excuse was given for their non-production no laches are imputed; and of course if he has notice of a prior equitable mortgage he cannot expect to be paid first.

But an equitable mortgagee has preference over a vendor who conveyed his estate without receiving his purchase-money when the receipt is indorsed on the conveyance, or, since the Act 1881, s. 55, in the body of the deed, which, with the other deeds, is delivered to the depositor, the mortgagee's equity being the better of the two, for it was in consequence of the laches of the vendor that the purchaser has been enabled to deal with the estate. (*Rice* v. *Rice*, 2 Drew. 73.)

An equitable mortgagee is liable to all the equities affecting the depositor, *e.g.*, if a trustee deposits title deeds in breach of trust, the depositary must yield to the prior equity of the cestui que trust, whether he has notice of the trust or not. (*Welchman* v. *The Coventry Union Bank*, 8 W. R. (V.-C. W.) 729.)

Tacking. Marsh *v.* Lee, 1 W. & T. Cas. p. 659.

Tacking.—Suppose A mortgages to B, then mortgages to C, and then again to D; it is evident that when B and C are paid off there will not be much left for D; therefore D is permitted to buy up B's mortgage and get both paid before C; provided—

1. That B has the **legal** estate, because of the maxim, "Where equities are equal the law will prevail." C and D are supposed both to stand a poor chance of getting

paid; it is a struggle between two drowning men, and the plank (*tabula in naufragio*) they wish to grasp is the legal estate; B has this; the one who buys it from him may satisfy all his claims, if he can, out of it, and equity is passive.

2. If D knows of the mortgage to C when he lends his money it will be his own fault to lend on such indifferent security and he cannot tack.

[Tacking was abolished by 37 & 38 Vict. c. 78, s. 7,] but this section has been repealed by 38 & 39 Vict. c. 87, s. 129, and it still exists, except in Yorkshire, where the Registry Act, 1884, has abolished it.

The following rules were laid down about tacking in the case of *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491.

1. A subsequent mortgagee can tack, even while the second is bringing an action to redeem the first (*pendente lite*), but having once obtained the legal estate, he must not again part with it, for it is upon the possession of it that his claim to priority rests. (*Rooper* v. *Harrison*, 2 K. & J. 86.)

2. If a judgment creditor or any other person who did not advance his money hoping to get the land instead, buys the first mortgage, he shall not tack.

There is also no tacking allowed when the legal estate is outstanding (as if it is vested in a trustee) unless one has a better right to call for it, as where a declaration of trust of it has been made in his favour. Thus a satisfied mortgagee who has not yet reconveyed the legal estate cannot convey it to any of the mesne incumbrancers, for he is considered trustee of it for all of them; on the same principle the mortgagor, if he has not parted with it, cannot, and the mortgagees must be paid in order of time; but an unsatisfied mortgagee having it may convey it to any one of them he pleases.

Neither can a prior mortgagee, taking an assignment of a third mortgage as trustee for another person, tack.

3. When a first mortgagee lends a further sum on a judgment or mortgage, or even on note, it being distinctly agreed at the time to be on the security of the mortgaged property, he can tack, provided the first mortgage is not paid off at the time. In all these cases it is needless again to repeat that there must be **no notice**, for want of notice is the sole equity.

Also a bond debt, and since 3 & 4 Will. IV. c. 104, a simple contract debt, may be tacked against the heir and devisee, they not being purchasers for value; this is to prevent circuity of action.

Consolidation. Suppose a mortgagee holds several securities belonging to the same mortgagor—or some one else holds them in trust for him—it being immaterial whether the mortgages have been made to secure different debts, or have taken place successively to secure the same debt; then he has a right to hold all of them until he is paid in full, and the mortgagor cannot at his selection redeem one at a time. This right is called **consolidation**, and in its original form was only just to the mortgagee, as the mortgagor might otherwise redeem those estates which were least heavily burdened. But the doctrine has been considerably extended; and the mortgagee has been allowed to hold all the securities, not only against the mortgagor, but against other persons, and thus a second mortgagee cannot redeem the estate by paying off the first mortgagee without also redeeming all the securities belonging to the same mortgagor, which he, the first mortgagee, holds; and the principle applies, although the first mortgages of the several estates were originally made to different mortgagees, but have come by transfer into the hands of one mortgagee. Thus if Dale is mortgaged to A, and Blackacre to B, and both are transferred to C, even with notice of a second mortgage of both estates, the second mortgagee cannot redeem one without the other, and if Dale and Blackacre are mortgaged to A, then to B, and Dale is then mort-

gaged to C, who knows nothing of B's claims, C, if he buys up both A's mortgages, after Dale is exhausted, shall pay his original claim out of Blackacre before B can touch it. (*Bovey* v. *Skipwith*, 1 Ch. Ca. 201.) The doctrine has been extended to equitable as well as legal mortgages, and to foreclosure as well as redemption suits. (*Selby* v. *Pomfret*, 1 J. & H. 336.) Blows have, however, recently been dealt at it. *Baker* v. *Gray*, 1 Ch. D. 491, decided that where the mortgage on estate A was not made till after the second mortgage on estate B, and the first mortgagee on B and the mortgagee on A both knew of the second mortgage on B before the transfer of estate A to the first mortgagee of estate B, there should be no consolidation against the second mortgagee seeking to redeem estate B; and *Mills* v. *Jennings*, 13 Ch. D. 639, and *Jennings* v. *Jordan*, 6 App. Cas. 698, and *Harter* v. *Colman*, 30 W. R. 484, extended this to the case of one of the mortgages being created after the assignment of the equity of redemption to the person seeking to redeem. *Cummins* v. *Fletcher*, 14 Ch. D. 708, has laid down that there shall be no consolidation until the interest of the mortgagor has become an equity of redemption, nor where the transaction is not between the same parties—as where one mortgage is to a firm, and another to one of the partners of it; nor shall there be any consolidation (*Re Ragget*, 16 Ch. D. 117) of an estate which has ceased to exist—as of a lease which has been forfeited by bankruptcy. Lastly, the Conveyancing Act, 1881, s. 17, provides that a mortgagor may redeem one mortgage apart from the others, provided,

1. There is no contrary intention in either of the mortgage deeds.
2. One at least of the mortgages is made after the commencement of the Act.

Therefore consolidation is now abolished unless there is a

contrary intention in one of the deeds, which there probably will be in most cases.

36 & 37 Vict. c. 66, s. 34, enacts that all actions, &c. relating to the redemption and foreclosure of mortgages shall be brought in the Chancery Division of the High Court of Justice.

Statutory forms. By ss. 26—29 of the Act 1881, mortgages of freeholds and leaseholds, transfers and reconveyances of mortgages may be made in certain short forms provided by the 3rd schedule of the Act, which may be varied in particular cases when desirable. These will be useful in simple cases, as all the covenants and conditions usually inserted in such instruments are implied in them. Thus in the statutory forms of mortgage there is implied, by s. 26, a covenant for repayment with interest, and the proviso for redemption with reconveyance to the mortgagor, or as he shall direct; by s. 6, the general words; by s. 7, covenants for title; by ss. 19—24, powers of sale, insurance and appointment of receiver; by s. 28, implied covenants are joint and several; by ss. 58, 59, "heirs and assigns," or "executors, and administrators and assigns," are inserted when necessary; by s. 63, "all the estate clause," &c.

Three forms of transfer are provided by s. 27—

(1.) When the mortgagor is not made a party.

(2.) When the mortgagor is a party and has dealt with his equity of redemption. Here a covenant is implied by him to pay the principal on the next day for the payment of interest, and to continue to pay interest if he does not.

(3.) When the mortgagor is a party and a new mortgage is effected. No increased stamp duty is here payable.

Sect. 24 provides a form of reconveyance.

CHAPTER V.

CUSTOMARY ESTATES.

A COPYHOLD may be defined to be an estate held by the will of the lord according to the custom of the manor. The lord has no real power now, and therefore the custom entirely rules the conditions on which copyholds may be held, for "custom is the life of copyholds." The origin of copyholds is involved in obscurity, but it is generally supposed that copyholders were the tenants in villenage, of whom the great mass of the agricultural population was composed during the reigns of the Norman kings. The base services which they rendered became in process of time commuted into rents. For the existence of a copyhold there must be a manor and lands, parcel of the manor, which lands must have been demised by copy of court roll from time immemorial, and finally a copyholder's court. All lands in the manor, and whatsoever concerns them, are capable of being granted out by copy; as a fair, appendant to the manor, a mill, a common, underwood, herbage, &c. A copyhold must have existed time out of mind, and can only be created at the present day by Act of Parliament (the inclination of the Legislature, however, is to get rid of this species of tenure—a relic of the feudal system—rather than to encourage it), or by custom to warrant the granting of the waste as copyhold; and then it is by operation of the custom, which when the lord shall have granted any portion of the waste, although it has not been granted before, makes that which was potentially

Copyholds. Origin.

demisable before as copyhold absolutely so. *Primâ facie* the lord is entitled to all the wastes; it is not essential that he should show acts of ownership of such lands, though a right to any waste may be established against him by repeated acts of ownership, as by cutting trees, digging turf, and the like.

Copyholds cannot be created by operation of law, because they are not creatures of law, but of fact: neither can express agreement change a freehold into a copyhold. They are created by grant based on ancient usage, and when they fall into the hands of the lord, he or his steward, if authorized, may regrant them under the usual services. Copyholds are susceptible of the same limitations of interest as freeholds; they may be held in possession, reversion, or remainder, in fee, in tail, or for life (often life estates only are permitted, the lives being renewed as they drop), always provided that the custom of the manor sanctions it. The Statute of Uses did not apply to them, but executory interests were always allowed; the freehold being in the lord no contingent limitation could fail for want of a particular estate to support it. Freehold interests can, therefore, be granted in estates of a base tenure, an apparent anomaly. The devolution of copyholds of inheritance is, subject to its being the custom of the manor, according to the decision in *Muggleton* v. *Barnett*, 1 H. & N. 282; 2 H. & N. 253, governed by the same canons of descent as freeholds, the Inheritance Act applying to them. The heir of a deceased copyholder may exercise any acts of ownership immediately after the decease of his ancestor, but the land is considered to belong to the lord until he is admitted. His position is much better than that of an unadmitted devisee.

Free-bench. Dower and curtesy do not exist unless by special custom. If there is dower, it is called **freebench**, and varies in amount. As the Dower Act of 1834 does not apply to copyholds, dower still attaches to all the lands of which

the husband *dies seised*, except in the manor of Cheltenham (where the old common law rule as to dower is followed). Of course in an equitable estate in a copyhold there cannot in any case be freebench, as it is only in consequence of the Dower Act that dower in equitable estates is allowed at all. The widow of a purchaser who dies before his admission or the presentment of the surrender, is entitled to freebench; for a subsequent admission makes the husband seised from the date of the surrender. A widow shall have freebench, though her husband who succeeded as heir was not admitted. (Gilb. Ten. 372, 5th ed.) Enfranchisement in the husband's lifetime, will destroy the title to freebench, because the estate has become freehold. In most manors freebench is a half, sometimes a third, sometimes the whole. It is usually for life, though occasionally only while she remains unmarried and chaste; in certain manors the forfeiture for unchastity is absolute, and in other manors redeemable. (Co. Litt. 33 b; see the *Spectator*, Letter 623, where an amusing account of the manner of avoiding the forfeiture is given.) Where the freebench extends to the whole of the lands, the widow may enter immediately and before admittance; but where to only a part, she cannot enter until an assignment has been made to her. Freebench may by custom be incident to copyholds for lives of which the husband died seised.

Curtesy. The rules in regard to curtesy, and its amount, are as variable as those of freebench. Curtesy may be of half, or of the whole; it may be for life, or may terminate on remarriage, and it may be subject to the condition of issue being born alive, or it may not. Although the widow may not have her freebench out of a trust estate, yet the husband can have his curtesy in respect of his wife's trust estate.

Estates tail. [Estates tail only exist in copyholds where in the manorial Courts the construction of the common law Courts was not followed, and limitations to a man and the

heirs of his body conferred successive life estates and not estates in which the fee was alienable on birth of issue; and therefore a custom to entail has grown up. Such a custom may be shown by a Court Roll containing a surrender to one of the heirs of his body with remainders over: for there can be no remainder over after a fee simple; or if the issue in tail have avoided the alienation of the ancestor.]

Estates tail in Copyholds.

[Copyhold land is not within De Donis. When that statute was passed, the copyholder, like the leaseholder, was thought so little of that no legislation was ever made in respect to him. He held his land as long as the lord pleased, and the lord's will was his only law. Consequently every lord could at his option permit the copyholder to dispose of his lands or not. If he permitted him to do so, a surrender to A and the heirs of his body would give A a fee simple conditional at the common law, and will give him the same estate to this day. In other manors alienation was not permitted at all. Therefore, when it became usual for sons to succeed their fathers, and custom began to prevail over permission, a series of estates tail was established. This was the very evil for which Fines and Recoveries were authorized, in order to avoid it in freeholds; an evil so great that the judicial body considered themselves justified in allowing a fictitious suit to set aside an Act of Parliament to avoid it. It was not probable, therefore, that much difficulty would be experienced in allowing estates tail in copyholds also to be barred. The practice of barring them became established by degrees, and was effected by either—

[1. A customary recovery in the manor Court. This was the most common way; or

[2. Forfeiture and regrant—a custom said to be peculiar to the manor of Wakefield, although effectual in any other manor (*Pilkington* v. *Stanhope*, 1 Sid. 314); or

[3. By surrender, even if it was only a surrender to the

use of a will, and the presumption was that, unless there was a contrary custom, such a surrender would bar the entail. (*Goold* v. *White*, Kay, 683.)

[An equitable estate tail was barred, according to the custom of the manor, in the same way as a legal one. (3 Ves. 127.)]

Estates tail in copyholds are now barred as prescribed by the Fines and Recoveries Act, 3 & 4 Will. IV. c. 74, s. 50.

If legal, a surrender entered on the Court Rolls shall in every case be sufficient, and if the estate is in remainder, the consent of the protector must be given by deed entered on the Court Rolls of the manor, or he must concur, which concurrence the Court Rolls must state. 3 & 4 Will. IV. c. 74. s. 51. s. 52.

If equitable, it may be barred either by—

(1) Deed entered on the Court Rolls as is done in the case of an estate of freehold tenure, or by s. 50.

(2) Surrender entered on the Court Rolls.

An equitable estate of a married woman may be barred by her and her husband surrendering them, and by her being separately examined as to her free consent. s. 90.

The early statutes did not, with some exceptions, apply to copyholds, owing to their insignificance: most later statutes apply to them.

The following are some of the statutes applying:—

Principal Statutes applying to copyholds.

20 Hen. III. c. 4 (Statute of Merton), giving damages to the wife, if deforced of her dower. It also allowed every lord to enclose or **approve** against common of pasture so much of the waste as he pleases, provided he leaves a sufficiency of common for the tenants.

32 Hen. VIII. c. 34, allowing the grantee of the reversion to take advantage of breach of covenant.

27 Eliz. c. 4 (Voluntary conveyances).

29 Car. II. c. 3, s. 7 (Statute of Frauds), providing that declarations of trust to be in writing.

3 & 4 Will. IV. c. 74 (Fines and Recoveries Act) (though customary freeholds are not in its provisions).

3 & 4 Will. IV. c. 104 (Romilly's Act).

3 & 4 Will. IV. c. 106 (Inheritance Act), and almost every statute in the present reign which deals with landed estates.

Statutes not applying. The following are instances of statutes not applying:—

13 Ed. I. c. 1 (De Donis).

13 Ed. I. c. 18 (Elegit).

18 Ed. I. c. 1 (Quia Emptores).

27 Hen. VIII. c. 10 (Statute of Uses).

31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32 (enforcing partition).

32 Hen. VIII. c. 1, and 34 Hen. VIII. c. 5 (wills).

13 Eliz. c. 5 (defrauding creditors).

The Acts relating to contingent remainders.

The Registration Acts.

3 & 4 Will. IV. c. 105 (dower).

The statutes relating to estates pur autre vie; and some others.

Alienation. [1. **By testament.**—Until Preston's Act, 55 Geo. III. c. 192, it was necessary to surrender the copyhold to such use as the testator should devise by his will. By that Act the previous surrender became unnecessary, and copyholds could be devised in the same manner as personal property.] 7 Will. IV. & 1 Vict. c. 26 includes them in its provisions, and they are now devisable as other property. It also allows (s. 3) an unadmitted surrenderee or devisee and a tenant pur autre vie to devise their interests. But an unadmitted surrenderee cannot convey *inter vivos*,

as his estate only commences from his admittance, though he can assign his equitable interest. (1 Watk. Cop. 102.)

2. **Inter vivos.**—The tenant **surrenders** into the hands of the lord. This may be done—

1. In Court. In which case it is entered on the rolls, and a copy given to the purchaser, signed by the steward and stamped.
2. Out of Court. The parties write a note of the transaction, and the steward signs and stamps it as before. In the old time mention or **presentment** of this had to be made by the homage in Court; but this is now unnecessary.

There is no surrender—

1. When copyholds are taken by a railway company, but a deed which is entered on the Court Rolls, and the lands must be enfranchised in a given time. (Railways Clauses Act, 1845, s. 25.)
2. When the copyhold passes, on the bankruptcy of the copyholder, to his trustee. (46 & 47 Vict. c. 52.)

A man could always make a surrender to the use of his wife—such a surrender not being a direct conveyance (which was formerly objected to on the ground of the husband and wife being one person), but operative through the instrumentality of the lord.

A surrenderee may release by deed his right to **Admittance**, before which he has merely an equitable and imperfect estate. [Originally admittance could not have taken place out of the manor.] It dates back to the surrender, therefore the first surrenderee when admitted will have the prior claim, although the surrenderor may have surrendered to, and the lord admitted others in the meantime. If the lord refuses to admit the tenant, he can be compelled by **mandamus** to do so. In the case of joint tenants the admission of one is the admission of all, and

as the lives drop the survivors require no new admission. If on a surrender no one claims admittance, the lord may, after a proclamation at three consecutive Courts, seize *quousque*, *i.e.*, until some one does claim; indeed, sometimes he may seize absolutely. But this is not permitted in the case of persons under disability; in default of their guardians doing so, the lord must appoint some person to admit them; nevertheless he can keep the rents till the fine is paid, and so may their guardian, &c., if he pays it himself.

Powers. The lord is not bound to accept a surrender of copyholds *inter vivos*, to such uses as the surrenderee shall appoint, and in default to the use of the surrenderee in fee (*Flack* v. *Master, &c. of Downing College*, 13 C. B. 945), the old rule construing surrenders of copyholds in the same way as conveyances and freeholds; but if he does accept it he is bound to admit the surrenderee. (*King* v. *Lord of Manor of Oundle*, 1 A. & E. 283.)

On a purchase of copyholds the Court Rolls should be examined to see if any dealings have taken place inconsistent with them. The vendor should produce all the copies of the Court Rolls, otherwise there may be an equitable mortgage on the property. The Rolls as a rule only show the facts of surrender and admittance—the trusts, &c., of the property being in separate documents.

When freeholds and copyholds are sold together, which have been held together for a long period, there should be a stipulation by the vendor restricting the purchaser's right to have the boundaries distinguished, as otherwise the purchaser can require this. (*Cross* v. *Lawrence*, 9 Hare, 962.)

Immunities. [Copyholders until recently were the subjects of peculiar immunities. They were not liable to debts, even Crown debts. They were of old exempted from military service.] Remainders in them were not liable to failure by the premature determination of the particular estate. Romilly's

Act, 3 & 4 Will. IV. c. 104, first made their estates equitable assets on the tenants' decease, and 1 & 2 Vict. c. 110, extended the operation of an elegit to them. In the event of bankruptcy they are sold for the benefit of creditors, and the Bankruptcy Act of 1869 (32 & 33 Vict. c. 71) empowers the trustee, without being admitted, to deal with the estate as if it had been surrendered to such uses as he may appoint (s. 22).

Burdens. They were and are still also liable to peculiar disadvantages. If a copyholder—

1. Commits waste (he is entitled to reasonable estovers); or
2. Leases for more than a year without leave[1] (S. L. A., 1882, s. 14, gives to a tenant for life of a manor a power to license a copyholder to lease the land as the Act enables a tenant for life to do); or
3. Neglects to perform the proper services; or
4. Alienates otherwise than by surrender,

he forfeits his estate.

Moreover he has to render ordinarily—

1. **Quit rents**—so called because he who rendered them was quit or free from all other services.
2. **Heriots** (sometimes) are due on the death of the copyholder (provided he has the legal, and not merely the equitable estate)—these are charges on the goods, generally the best beast. No heriot is due on the death of a married woman, as she has no legal estate in chattels. (1 Cr. T. 10, c. 4, s. 51.)
3. **Fines**—payments on descent or alienation, which are either—
    1. Fixed.

[1] He cannot lease for twenty-one years without licence as a freeholder can do under the Settled Estates Act (40 & 41 Vict. c. 18, s. 8).

2. Arbitrary. But no fine can now amount to more than two years' improved value of the land. All fines are due on admittance.[1] Tenants in common are admitted severally, and pay one fine between them, but an alienee, devisee, or heir, if any, pays another fine. (*Garland* v. *Jekyll*, 2 Bing. 273.) Joint tenants and co-parceners pay one fine for all. For joint tenants two years' value is due on the first life, half that on the second, half again on the third, and so on; therefore whatever may be the number of the tenants the fine can never reach four years' value, though it may differ infinitesimally from it.

4. **The oath of fealty.**
5. **Relief.**

   But the commutation of all these rights which the lord has is favoured by the recent Copyhold Acts.

6. Also his estate **escheats** to the lord on failure of heirs.

The timber, whoever plants it, and the mines, belong to the lord, but he cannot enter to dig them without the copyholder's consent. The minerals do not pass to the tenant on enfranchisement, unless there is such an agreement in the enfranchisement deed.

Mortgages.

Mortgages of Copyholds are usually effected by the grantor covenanting that he will surrender to the mortgagee subject to a condition making void the surrender on repayment of interest and principal in six months. The surrender is made when the money is advanced, and when paid satisfaction is entered up. The mortgagee is

[1] The steward can get his fees before admittance.

not usually admitted, owing to the fine, as long as there is any chance of the mortgagor ever being able to repay.

If a lord of a manor mortgages his estate, and subsequently to the mortgage copyholds are surrendered to him, these copyholds will be included in the mortgage; for a mortgage of property includes all things appendant to it, otherwise the mortgagor's estate would be less valuable. (Scriv. Cop., 5th ed., p. 30.)

Fines in joint tenancies.

Copyholds are often held jointly or in common. On account of the heavy fines due in the case of joint tenants, it is always inexpedient to leave property to trustees upon trust to sell, because they will have to be admitted and pay the fine, and the purchaser must also pay another fine. If, however, this has been done all the trustees except one should disclaim, but even then two fines must be paid. The proper course is to give them a power to sell, so as to render their admittance unnecessary, and they can make a good title without admittance, even though the lord has in the meantime seized *quosque* for want of a tenant.[1]

The purchaser, in the absence of stipulation to the contrary, pays the fine and expenses of surrender and admittance.

Extinguishment.

When the copyhold falls into the hands of the lord in any of the ways previously mentioned, or the tenant surrenders to him, it is said to be extinguished; he may then regrant it on the same conditions or turn it into a freehold.

Enfranchisement.

If the lord conveys the freehold to the tenant, or releases his seignorial rights to him, the copyhold is said to be enfranchised. Enfranchisement may now be voluntary or compulsory. It is in fact a purchase of the copyhold. By these two methods, and no other, can a copyhold be done away with. But a copyhold may be suspended; for

Suspension.

[1] *Glass* v. *Richardson*, 9 Hare, 698.

instance, if a copyholder marries the lady of the manor the copyhold will be suspended during the coverture and during an estate for the curtesy, if according to the custom of the manor there is such an estate afterwards, but not extinguished. (Cruise, 4th ed., v. i., p. 329.) Again, suppose the copyholder becomes king, there will be a suspension, as he cannot perform the services, they being inconsistent with royalty; but after his death, the next person, if a subject, will hold by copy.

The Improvement of Copyhold Tenure Act. 4 & 5 Vict. c. 35, s. 85, allows compulsory partition of undivided estates in copyhold lands—which was previously not permitted.

It has also facilitated the commutation of fines, heriots,
s. 14. and other manorial rights by changing them into a rent
s. 56, &c. charge, and provided for the enfranchisement of settled lands, and lands where the parties could not arrange for
s. 79. themselves, saving the freebench and curtesy of persons married before the enfranchisement, and reserving to them
s. 81. all commonable rights.

It allows courts to be held without any copyholder, but a month's notice must be given to anyone not present
s. 87. of any proclamation before it can affect him, and permits
s. 88. the steward to make grants when out of the manor, and the admission of the new tenant is valid without the
s. 90. surrender of the previous one being presented (formerly when a copyhold was devised the will had to be pre-
s. 89. sented); if entered on the Court Rolls it is sufficient;
s. 91. but where the lord may, with the consent of the homage, grant the waste lands the Court must still be summoned for that purpose.

Act of 1852. 15 & 16 Vict. c. 51, makes enfranchisement compulsory. If the tenant compels it the enfranchisement is paid at once or charged on the land as a mortgage.

If the lord compels it, it is to be an annual rent charge, ranging or not with the price of corn, unless the parties

agree to the contrary. The Act does not interfere with enfranchisements made irrespective of it, nor with any rights to mines or minerals, and the curtesy and freebench of persons married before the enfranchisement is completed is expressly saved, and all commonable rights continue.

By 21 & 22 Vict. c. 94, an **award** confirmed by the commissioners effects the enfranchisement. **Act of 1858.**

An enfranchisement may be made by a tenant for life with or without a regrant of any right of common, or other right, belonging to the land enfranchised (s. 4, sub-s. 7.) **S. L. A. 1882.**

A customary freehold is an estate held according to the custom of the manor, but not at the will of the lord. Yet the freehold is in the lord, and the tenants cannot cut timber or dig mines or lease without his consent. These tenants were probably favoured copyholders.[1] It is conveyed sometimes by deed of grant instead of surrender (to complete his title, however, the tenant must be admitted), sometimes by bargain and sale and admittance (Burt. Comp. pl. 1283); it all depends upon the custom of the manor. The Fines and Recoveries Act does not apply to this class of estate, therefore it is barred in the same manner as before the Act. **Customary freehold.**

Ancient demesne is a tenure existing in manors which were in the hands of the Crown at the time of Edward the Confessor. The late Mr. Joshua Williams, in his able treatise on Real Property, considers ancient demesne to be a free tenure (Williams' R. P., 13th ed., p. 132), but **Ancient demesne.**

[1] According to Cruise they are of two species—1. Where the freehold is in the lord: these are called free copyholders. 2. Where it is in the tenant: these are customary freeholders. 4th ed., v. i., p. 255.

according to Blackstone, it is copyhold. (2 Bl. Com. 100; but see St. Com., 7th ed., v. i., p. 223.) The tenant enjoys some immunities, the chief of which is the right of suing and being sued in the lord's Court, a right which occasioned some confusion in the days of Fines and Recoveries, for these proceedings, being judicial in their nature, could only take place there; but as the nature of the tenure was not always known, inconvenience frequently arose by their being taken by mistake in the Court of Common Pleas.

It, in fact, partakes of the baseness of villenage in the nature of its services, and of the freedom of socage in its certainty. Bracton calls it villein socage.

CHAPTER VI.

ESTATES HELD PROMISCUOUSLY.

Estates are held in severalty or in community. The latter are of four kinds—

1. Joint tenancy.
2. Coparcenary.
3. Tenancy in common.
4. Tenancy by entireties.

I. Joint Tenants.

If land is given to A and B, there being no words of severance used, they become joint tenants for life. If it is given to A and B and their heirs they become joint tenants of the fee, and the heir of the survivor succeeds if there has been no severance of the tenancy *inter vivos*. If it is given to A and B and the heirs of their bodies they become— How created.

1. (If they cannot intermarry) joint tenants for life, and on the death of the survivor their heirs will be tenants in common in tail.
2. (If they can intermarry) they will have an estate in special tail, sharing the profits during their joint lives, the survivor, and then their joint heirs, taking the whole. If they have no heirs or do not marry, the estate will terminate at the death of the survivor. Although they may both be married to third persons when the grant is made, yet the law will still consider that they may possibly intermarry.

When a joint tenant dies, his share passes to the survivor or survivors, and the ultimate survivor is sole tenant of the whole estate. This is called the *jus accrescendi*, and is peculiar to joint tenancies.

Unities. To create a joint tenancy, it is necessary that—

(i.) The same person

1. Title. (ii.) by the same instrument—must give the estate, and the donees must take it

2. Time. (iii.) at the same time,[1] **except**

1. When the conveyance is under the Statute of Uses.
2. Or by will.

3. Interest. (iv.) the estates must be of equal duration as to quantity,[2] and

4. Possession. (v.) the possession promiscuous.

How terminated. Joint tenancies are terminated as follows:—

1. If one desires to surrender his share to the other, the other has the whole in severalty; if to the others collectively, there being several, they have the whole jointly; but if to one of the others the surrenderee has that part in common with the rest—which rest they still hold jointly. These surrenders are effected by a **Release.** An ordinary conveyance is not appropriate, for each is supposed to have the whole estate already, as they are seised *per mie et per tout.*
2. Any **accession of interest** (such as if when A and B are joint tenants the reversioner dies and the

[1] That is, they must be able to take at once. For instance, it cannot be limited to A and the heirs of B jointly. In this case, A will take the whole, and the heir of B when ascertained will not participate.

[2] Thus an estate cannot be given to A for life jointly with B in fee. The estates must be all life estates, or all fees simple or entails.

inheritance devolves upon B) will destroy the unity of interest, and thus sever the jointure.

3. If one conveys his estate to a third person the unity of title is destroyed, and the others and the third person will hold as tenants in common.

4. If the joint tenants desire to become several tenants, they can do so by making **mutual conveyances** in the form of releases of their respective shares, or by application to the Inclosure Commissioners, who will make an order for the partition. Formerly one could not compel the other to sever the jointure; if it was distasteful to him he could have disclaimed the estate when given, but could not compel partition afterwards without the consent of the other. Statutes 31 Hen. VIII. c. 1 & 32 Hen. VIII. c. 32 permitted this to be done by a writ of partition, but now it is effected through the instrumentality of the High Court of Justice. Also by 31 & 32 Vict. c. 40, s. 3, the Partition Act, 1868, in a partition suit, if desirable, owing to the nature of the property or otherwise, the Court *may* direct a sale instead of a division, on the request of any of the parties, and notwithstanding the dissent of the rest, and (s. 4) if such request proceeds from parties interested to the extent of a moiety or upwards, it *shall* direct a sale unless it sees good reason to the contrary; and (s. 5) if any party interested requests a sale, the Court may, if it thinks fit, unless the other parties, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale, and may order a valuation of the share of the party requesting a sale; and by the Partition Amendment Act of 1876 (39 & 40 Vict. c. 17), a sale may be directed on the application of any person under disability. Also **Partition.**

an action for partition shall include an action for sale and distribution of the proceeds, and in such an action it shall be sufficient to claim a sale and distribution only, and power is given to the Court to dispense with service of the notice of decree. Where owners of $\frac{3}{16}$ths sought a sale, and owners of $\frac{13}{16}$ths objected, and offered to purchase their shares at a valuation, the House of Lords directed a sale, deciding that the case fell under the 3rd section, and that the 5th section did not control the 3rd. A party asking for a sale is not compellable to part with his share at a valuation. (*Pitt* v. *Jones*, *Gilbert* v. *Smith*, 11 Ch. D. 78; 5 App. Cas. 651.)

Equity leans against joint tenancy.

Morley v. Bird, Tudor Cas. Pry. 778.

Joint tenants as regards strangers are considered as one person, though of course they may consist of any number. Therefore, a release by one is a release by all. Joint tenancy was more favoured by the common law than tenancy in common, because the feudal services were indivisible. Equity, on the other hand, leans against it, as the right of survivorship amd some other of its incidents are apt to work injustice, and will, whenever it can find an excuse for doing so, construe the tenancy to be one in common; for instance—

1. When persons purchasing land pay for it in *unequal* shares.
2. [*In any case* when persons took a mortgage to themselves. Therefore, when trustees advanced money on mortgage, they had to state that it was advanced on a joint and not a several account, in equity as well as in law, otherwise the representatives of any who might have died would have had to join in the reconveyance; and if they were infants or persons incapable of conveying, this would have entailed inconvenience.] But by

s. 61 of the Act 1881 this is no longer necessary, for the joint account clause is, subject to contrary intention, rendered an incident to every mortgage when made by two or more jointly, and it is sufficient to express that it is advanced with money belonging to them on a joint account.

3. In joint purchases for purposes of partnership. Lake *v.* Gibson, 1 W. & T. Cas. 198.

Trustees are invariably made joint tenants, because the inseparable right of survivorship or *jus accrescendi* (which means that the survivors take the shares of the deceased) prevents the heirs of those dying first from being concerned in the property.

Only the survivor can dispose of the estate by will, and the incidents of dower and curtesy attach to him or her alone. The right of survivorship need not always be equal. Thus if lands are given to A and B during the life of A, if B dies A has all; but if A dies B has nothing (2 Cruise T. 18, c. 1, s. 32). Blackstone, however, considers equality of interest material, and says that a corporation cannot be a joint tenant with an individual, owing to the inequality of interest; Littleton considers it in no case material, provided the estates are of the same quantity. But a reversion on a freehold cannot be held in joint tenancy with a freehold in possession (Litt. s. 302). An individual cannot hold jointly with the Crown, for the prerogative of the Crown will make its interest swamp that of the private person, and he will get nothing.

One corporation cannot be a joint tenant with another.

If one of several joint tenants dissolves the jointure, only his share is severed; the others still continue to hold jointly.

II. Coparceners. **Coparceners.**

1. Where in any estate females inherit in default of males; or

2. Where by particular custom males inherit in equal degree; or
3. Where in either of the above cases the persons inheriting die intestate, and their estates descend to their heirs.

These heirs are called coparceners, and could always compel partition, because their estate was thrust upon them by act of law. There must be—

1. Unity of possession.
2. Unity of title, as they claim by descent from the same person; but there is no unity of time, because if one dies his or her heir will be coparcener with the survivors.
3. They have unity, but not entirety of interest; for on the death of any—intestate, their part descends to their respective heirs. Neither need the shares be equal; thus if there are three grand-daughters, two of whom are sisters; these two between them will only have the same share as their cousin.

Dower and curtesy exists amongst coparceners, and they can devise their estates.

How severed.

Coparceners can sever their estates as follows—

1. On making partition they will hold in severalty.
2. On mere alienation by any of them, the purchaser will hold in common with the rest.
3. By the whole becoming vested in one, the coparcenary is dissolved.

Tenancy in common.

III. Tenants in Common.

How created.

A tenancy in common is created—

1. If land is conveyed to two or more persons in distinct shares they become tenants in common, and the only unity between them will be that of possession.
2. If two or more hold under the same title (other

than descent) their interests having accrued at different periods, provided the estate is not limited to them by a conveyance operating under the Statute of Uses or by will (*See* p. 86).

3. If a joint tenant or coparcener alienates to a stranger—in which case the stranger and the remaining joint tenants or coparceners hold under different titles.
4. By construction of equity as above stated (*See* p. 88).
5. By act of law—as occurs on the death of two persons (who cannot intermarry) to whom an estate tail has been given jointly (*See* p. 85).

How destroyed.

1. By partition, which is done by making mutual conveyances as between strangers.
2. By union of all the titles and interests in one tenant.

A tenancy in common differs in nowise from an estate in severalty, except that there is unity of possession.

Tenant by entireties.

Tenants by entireties.—Tenants by entireties are those seized *per tout* and not *per mie*, as husband and wife, for they are one person and so cannot take by moieties. Both must consent to alienate, and the whole goes to the survivor in the event of the death of either. If land is given to A, B, and C jointly, and A and B are husband and wife, they will hold jointly with C, as if there were two persons only. It has, however, been decided in *Mander* v. *Harris*, 31 W. R. 885, that a devise, coming into effect after the commencement of the Married Women's Property Act, 1882, of realty and personalty to A, B, and E, the wife of B, to and for their own use and benefit absolutely, gives each one third.

CHAPTER VII.

INCORPOREAL HEREDITAMENTS.

INCORPOREAL hereditaments are rights issuing out of corporeal hereditaments, and generally *in alieno solo*. They either consist of—

Profits. **Profits**, which may be defined to be the right of one man to take something from the land of another; or

Easements. **Easements**—occurring where the owner of one estate is compelled to allow another to enjoy some privilege over his property, as a right of way. He who enjoys the privilege is said to have the **dominant tenement**, and he who submits to the exercise, the **servient tenement.**

Easements may be acquired by—

1. Express or implied grant.
2. Prescription.
3. Act of Parliament.

They may be extinguished by—

1. Release.
2. Act of Parliament.
3. Unity of possession.
4. Licence from the owner of the dominant tenement to do some act destroying the easement.
5. Abandonment by non-user.
6. Lapse of the purpose for which the easement was granted.

Incorporeal hereditaments are either—

1. **Appendant**—when they are annexed to some corporeal hereditament immemorially.

2. **Appurtenant**—when they are annexed to it by grant or prescription.
3. **In gross**—when they exist independently and arise either by the owner of the estate granting them or reserving them when granting the estate.

They are not strictly tenements, but fall under that word (generally) as used by De Donis, and are capable of being entailed. On intestacy, they devolve as realty, and are capable of special though not of general occupancy. Formerly, not being subject to tenure, they could not escheat; and such as are self-existing as a rent charge when the owner died intestate ceased to exist. But now by the Intestate Estates Act, 1884 (47 & 48 Vict. c. 71, s. 4), they escheat (see *post*, c. 9).

The principal incorporeal hereditaments are:—

Watercourses.

1. **Watercourses**—rights which a man has to the benefit of the flow of a stream. If the bank on one side belongs to him, and the bank on the other to some one else, the proprietor of each bank is considered *primâ facie* the proprietor of half the land covered by the stream, unless the stream is navigable; for then, the bed of it at least, so far as the tide flows, belongs presumably to the Crown. The higher or superior riparian proprietor must not interrupt the flow of the water so as to detriment the right of an inferior riparian proprietor, neither must he empty objectionable matter into it, so as to interfere with the enjoyment of others who have a like privilege, the maxim being, "*sic utere tuo ut alienum non laedas.*"

A watercourse having its origin *ex jure naturae*, and not from grant or prescription, is not extinguished by unity of possession. (Sury *v.* Pigot, Tud. Cas. Pry. 128.)

Franchises.

2. **Franchises**—which are given by royal grant or by prescription, which pre-supposes a grant, as a right to have a fair, ferry, forest or chase.

Offices, &c. 3. **Offices and Dignities**—as hereditary titles.

Ways. 4. **Rights of way**—which are permissions to go over another man's land, and may arise by grant, prescription, or necessity; as if A gives B a house in the middle of a field he is obliged to permit him to traverse the field to get to it.

Lights. 5. **Ancient lights**—as where A, by grant or user, has the right of not having his windows obstructed. The right is sometimes implied, as if a man sells a house, retaining land adjoining it, he can in no case derogate from his own grant by blocking up the view.

Commons. Tyrringham's case, Tud. Cas. Pry. 101. Pasture.

6. **Commons.**—A right of common is a right to take some part of the produce of land which belongs to another, and may be either of pasture, turbary, piscary, and estovers. Common of pasture, the right of feeding one's beasts on another person's land, if **appendant** applies to all commonable beasts, such as are useful for ploughing, &c., and the number allowed to graze is as many as the land will maintain during winter. If **appurtenant**, it extends to beasts which are not commonable, and so it does if **of vicinage**, which is when two townships, lying contiguous, have intercommoned, and the number allowed is the same as above; but if **in gross**, the number may be unlimited. Common appurtenant and in gross arise from grant or prescription, but common appendant is the right of the tenants to feed their cattle on the waste lands of the manor, and therefore must have dated previous to Quia Emptores. But recently these rights have been to some extent done away with by the various **Inclosure Acts.**

Early in the present century inclosures were effected by means of a private Act of Parliament for each particular common, subject to a general Act, which contained regulations for all. But by 8 & 9 Vict. c. 118, the sanction of

the Inclosure Commissioners alone is necessary. They may also sanction exchanges, such as socage lands for gavelkind, and freeholds for copyholds, and partitions of undivided shares as previously mentioned. Several Acts have been passed in the present reign for facilitating the inclosure of commons, among the principal of which is the Commons Act of 1876, which, besides making provisions for their inclosure, regulates and improves those uninclosed, and enacts that any common situated within six miles of a town, having not less than 5000 inhabitants, is to be called a suburban common, and subjected to particular rules. It also facilitates the allotment of gardens and open-air places for the poor. 39 & 40 Vict. c. 56.

The soil of a highway to the middle of a road presumptively belongs to the owner of the adjoining inclosure, and will pass by a conveyance of it. Therefore the strips of waste land on each side of a highway belong to the owner of such inclosure; it is said that formerly these were left uninclosed, so that the public might not break through the fences to pass when roads were out of repair.

Estovers. **Common of estovers** is a right of taking necessary house-bote (a sufficient allowance of wood to repair or burn in a house), ploughbote and cartbote (wood employed in a making instruments of husbandry), haybote and hedge-bote (wood for making fences) in another's woods. It cannot be apportioned.

Turbary. **Common of turbary** is a right to dig turf. It can only be appendant to a house—not to land, for the turf is to be burned in the house; and it must not be sold. **Piscary.** **Common of piscary** is a right to fish. There is also common of the soil and common of foldage, or liberty of folding sheep on another's ground, and a common of digging for coals, minerals, &c.

Seignories. 7. **Seignories** are the lordships in manors, which with their attendant incidents must have been created previous

to Quia Emptores. These are generally **appendant**, but may be **in gross**, which happens when the lordship is separated from the lands. A conveyance of the lands will pass the seignory without express mention. It is not an estate, as no estate can be left after granting a fee simple; it is a mere incorporeal right occurring whenever a man has one or more tenants in fee simple holding under him.

Formerly there could be no manor without a mansion house at which the services were due and might be rendered, and from which this peculiar species of estate derived its appellation, but now the demesne may consist entirely of land, which, with the services, are sufficient to support it. Also a seignory in gross can exist without any land at all.

Rents. Clun's case, Tud. Cas. Pry. 233.

8. **Rents.**—The word signifies a *redditus* or return to be yielded periodically out of the profits of some corporeal hereditament. There are a few cases in which it can be reserved out of an incorporeal hereditament. Thus—

1. The sovereign can grant or reserve a rent out of an incorporeal hereditament by prerogative (Co. Litt. 47, a), or
2. A subject by statute may have a like privilege.
3. By 5 Geo. 4, c. 17, certain ecclesiastical persons may reserve rents out of tithes or other incorporeal hereditaments.
4. A rent may be reserved upon a grant of a reversion or remainder, there being a remedy by distress when the expectancy comes into possession. (Co. Litt. 47, a, 142, a.)

There are three kinds of rents—

Rent Service.

(1.) **Rent Service.**—This has always been incident to the reversion, and accrues in connection with tenure. It need not be paid in money, but at

the present day it always is so paid, except where a nominal or peppercorn rent is reserved for the purpose of obtaining an acknowledgment of title. The remedies for non-payment are :—

1. **Distress**—a power naturally incident to it.
2. **Re-entry**—a condition for which is usually inserted in leases. No demand for the rent need now be made, but the landlord may eject the tenant directly the time specified by the condition has expired.

But courts of law (23 & 24 Vict. c. 126, s. 1) and equity (15 & 16 Vict. c. 76, s. 210) will give relief if the tenant pays in six months after the judgment of the ejectment. By 32 Hen. VIII. c. 34,[1] a **condition of re-entry** is made assignable, grantees of reversions being enabled to enjoy all the benefits and remedies by entry or action for non-performance of conditions which the grantors had, for otherwise at the dissolution of the monasteries, the grantees of the Crown would not have been able to take advantage of the conditions inserted in the leases of the abbey lands. [At common law if the reversion was destroyed, the rent was lost.] This was remedied by 8 & 9 Vict. c. 106, s. 9. By 22 & 23 Vict. c. 35, s. 3, when the reversion is severed,[2] each assignee shall have the benefit of the conditions of re-entry for non-payment of rent which concern his portion, the rent

[1] Leases not under seal were not within this statute (*Smith* v. *Eggington*, L. R. 9 C. P. 145). Also the benefit of the lessee's covenants did not run with the reversion when the lessor had not the legal estate, and that fact appeared on the lease (*Pargetu* v. *Harris*, 7 Q. B. 708).

[2] The reversion might be severed by the lessor selling part and retaining part—selling the subject-matter in lots, purchasing the lessee's interest in part and other ways.

to be legally apportioned; and now by the Conveyancing Act, 1881, s. 10, rent and the benefit of the lessee's covenants run with the reversion in every case notwithstanding the severance of the reversion by conveyance, surrender or otherwise, thus completely reversing the rule in Dumpor's case, 4 Rep. 119, b., that a condition is indivisible. The rent passes by a grant of the reversion without express mention.

Rent charge.

(2.) **Rent charge**—which is unconnected with tenure; [and it was therefore always necessary to add a clause of distress.] 4 Geo. II. c. 28, however, made a right of distress incident to a rent charge, and the Act, 1881, s. 44, gives power of distress to rent chargees and annuitants, whenever the rent (not being incident to the reversion) or annuity is in arrear 20 days, and when in arrear 40 days a power to enter and sequestrate the income without impeachment of waste (although no legal demand may have been made), and to demise the land to trustees for a term upon trust to raise the amount due. Jointures are often secured by means of a rent charge.

It may arise—

1. By will.
2. By deed—as when a man grants his land to another, reserving a rent, and adding a clause of distress; or when he grants a rent out of his land with a similar clause. In the first case, the whole estate must be granted, for if not, tenure will arise between the grantor and grantee, and the rent will be rent service. This, indeed, is the only way of creating rent service.

A rent charge must be distinguished from a personal annuity in that—

1. It is charged on land, as if A grants £100

a year to B and his heirs chargeable on his estate of Dale, while a personal annuity, though a hereditament, is not chargeable on any estate.

2. Although it is not subject to tenure (as no fealty or rent can be reserved out of it, neither does it escheat, but merely ceases to exist when there is no one entitled) yet it falls under De Donis, and an estate tail can be given; this is not permitted in an annuity either at law or in equity, nor in any species of personal property.

By 22 & 23 Vict. c. 35, s. 10, a release of a rent charge on part of the lands will not free the other part from the charge on them, but the whole rent cannot be claimed from the unreleased portion unless there is an express provision to that effect (*Booth* v. *Smith*, W. N. 1884, 230); and by s. 11, the same rule applies to the release of part of the lands from a judgment; before this time these charges were considered indivisible, and a release of part would extinguish all; but if the owner purchases part, it will still be a release of all. (Pask. Judg. 89.)

(3.) **A rent seck**, or dry and barren rent, [was in all respects similar to a rent charge, except that there was no power of distress,] but this was given by stat. 4 Geo. II., so that the distinction between them is now unimportant.

Rent becomes due and payable on the land if no particular place is mentioned; unlike interest, it did not at the common law accrue from day to day, but all became due at once, and at the close of the day on which it was payable, [so that if the estate of the landlord determined between the times of payment, the money was lost to his

representatives even though the rent itself continued to be payable, as it would be under a lease authorized by the Settled Estates Act, or under a power; the next tenant would receive the whole, even though he had only been the landlord for a day or two; 11 Geo. IV. c. 19, and 4 & 5 Will. IV. c. 22, gave partial remedies in this respect,] and finally the **Apportionment Act** of 1870, 33 & 34 Vict. c. 35, provides that after the 1st August, 1870, all rents and other periodical payments in the nature of income shall be apportioned, whether the tenancy is created verbally or by writing—in the absence of words to the contrary (s. 7). But, by s. 6, policies of assurance are excepted from the Act.

Advowsons.

9. **Advowsons.**—An advowson is the perpetual right of presenting a clergyman to an ecclesiastical benefice on a vacancy of the living, and is real property. Advowsons are presentative, donative, collative, and elective (as in cathedrals and corporations). If presentative, the patron has a right to present his clerk to the bishop, and to demand his institution and induction if he be qualified. If donative, the patron can place the clerk in possession without presentation, induction, or institution, and the ordinary has no power of visitation or deprivation. (Co. Litt. 44 a.) If collative, the right of nomination is vested in the bishop, and there is no presentation or institution.

Next presentation.

A **next presentation** is the right to present on the next vacancy, and is personal property, except when the last incumbent was also patron, or where the advowson is donative, in which cases it is real property. Therefore, if the church is empty, that is to say, if there is no rector or vicar (as may occur, owing to the death or preferment of the last one) when the patron dies, except in the case above mentioned, his executors and not his heir will have the right to present. If the church is full (that is, a clergyman officiating) at his death, there will be no next presentation at once; the heir or devisee will take the ad-

vowson, which includes all the future presentations, for the next presentation is only severed from the advowson, and becomes property itself separately when the living is vacant.

The husband of a married woman presents in her right during the coverture in those cases in which he is entitled to the rents and profits of her land during the coverture, also after her death if he is tenant by the curtesy; that is, he has the right of presenting, if there is a vacancy during his lifetime. In cases in which the land is her separate estate, she presents, and curtesy only exists if she has died intestate. She, if she has dower, has the third presentation after his death. An infant presents, and not his guardian. Joint tenants concur; if they disagree, the bishop may admit which nominee he pleases; or refuse all, in which case there may be lapse. (Co. Litt. 186 b.) Partition may be made of the advowson by their presenting in turns. Coparceners and tenants in common must concur, and if they cannot, the former present in turn and the latter decide by lot. If one cannot, as a Papist, the others present. A mortgagee presents the nominee of the mortgagor, in spite of agreement to the contrary. (*Jory* v. *Cox*, Prec. Ch. 71.) A bankrupt presents his one nominee; this right not passing to his trustee. The Lord Chancellor presents for a lunatic. An alien may now present, but not a Roman Catholic, or a Jew, for whom the Archbishop of Canterbury presents. If the patron does not present in six months, there is lapse to the bishop, and if he does not in six months, lapse to the Archbishop, and if he does not in six months, lapse to the Crown, who may present at any time. The patron may still present after lapse, unless it is lapse to the Crown. When a vacancy occurs by lapse or plurality, lapse occurs without notice to the patron—*secus* if by resignation or canonical deprivation.

Origin of advowsons. In the old times the lords of manors built churches on their estates and endowed them, nominating whoever they

pleased (provided he was fit) to be the clergyman, and the person so nominated was supported by the tithes. The advowson was "appendant" to the manor and passed with it, and such is the law still. An advowson is "in gross" when it has been granted away from the land, or excepted in a grant of the land, or when the person who built the church became the patron merely. It may be partly appendant and partly in gross, as when the patron has granted away the right to present at every other turn.

When appropriated. The clergyman is the parson, and has a full right to the glebe, tithes, and all the dues. Sometimes by begging or buying the religious houses obtained advowsons; they were then said to be **appropriated**; the appropriator took the tithes and appointed one of its body to do the duties, paying him a salary; [he was called the *vicar* (*vicarius*), and was in the same position as curates are now, being entirely at the will of the ecclesiastical house, and very poorly paid till 15 Ric. II. enacted that vicarages should be sufficiently endowed, and 4 Hen. IV., that the office should be permanent;] at the present day a vicar principally differs from a rector in that he only has a share of the dues and the small tithes, the appropriator taking the greater part, while a rector has all of them.

Simony. Advowsons are subject to the stringent rules against **Simony**, which is defined to be the corrupt presentation to an ecclesiastical benefice. 31 Eliz. c. 6, has enacted that nobody may buy a next presentation when the church is empty—*secus* when full. But by 12 Anne, c. 12, a clergyman may not buy it when full. In fact he may never buy it. But he may buy an advowson (if the church is empty when he buys it, the next presentation will not pass in the purchase; therefore, the rule that he may not buy a next presentation is not broken) and when it is empty present himself. A purchase of a life estate in an advowson is not a purchase of the next presentation, and the purchaser may present himself on the next avoidance.

Although the incumbent is dying, the living is not considered vacant: he must actually be dead. (*Fox* v. *Bishop of Chester*, 2 B. & C. 635, and Tudor, Cas. Pry. 190.) If a person presents for reward, both giver and taker forfeit 2 years' value of the benefice, half to the king and half to an informer, the presentation is void, the presentee for ever incapable of enjoying the benefice, and the Crown presents that turn.

Resignation bonds. When the patron had a relative intended for the church, he would often put some one in temporarily, until this relative could take the living, the somebody agreeing by bond to resign when desired; bonds were occasionally also given to resign on the happening of a certain event, or in favour of a certain person. In the former case they were said to be **general resignation bonds**, and as they reduced the clergyman to complete subservience to the will of the patron they were always illegal. In the latter, they were called **special resignation bonds**, and were legal until the case of *Fletcher* v. *Lord Sondes* (3 Bing. 501, in Dom. Proc.) decided that they were not so. But 9 Geo. IV. c. 94, passed directly after, provides that all special bonds shall be upheld if made in favour of any one person or of one of two persons standing in the relation of uncle, son, grandson, brother, nephew, or grandnephew, to the patron by blood or marriage.

Plurality. No spiritual person may hold more than two benefices without licence from the Archbishop of Canterbury, except an archdeacon, who may hold two as well as his archdeaconry. The two must be within three miles of one another, and the annual value of one must not exceed £100. If one has more than 3,000 persons, the other must not have more than 500. On plurality contrary to the above the previous benefice becomes void as on resignation.

Tithes. 10. **Tithes form a separate inheritance, and do not merge of their own accord when both they and the land happen to**

be owned by the same person, but they may be made by deed to do so, and provisions to this effect are inserted in the Tithe Commutation Acts; but if the person wishing to effect the merger is a tenant for life only, he must get the reversioner or remainderman to join in the deed. After the dissolution of the monasteries, Henry VIII. granted many of the abbey lands to laymen; and in these grants the tithes were included; thus they first passed into lay hands; and 32 Hen. VIII. c. 7, s. 7, made them capable of being entailed, and of being held by the same estates as lands. Persons exempted from paying them are:—

1. Those making a real composition, as of land or whatever might be accepted instead.
2. Those discharged—1, by custom, *de modo decimandi*, which is a composition; it must be certain and beneficial to the parson. 2, *de non decimandi*, *e. g.*, a total exemption. Such as the king or a vicar (but not any lay person) would have;[1] but 31 Hen. VIII. enacted that lay persons becoming possessed of abbey lands which were exempted, should themselves be exempted. Tithes will soon become a thing of the past, owing to the various commutation Acts,[2] beginning with 6 & 7 Wm. IV. c. 71, and continuing down to the present day, which substitute a rent-charge varying with the price of corn, the average of which, for the last seven years, is taken.[3]

[1] Certain religious orders—*e. g.* Hospitallers, Cisternians, Templars, Præmonstratenses, were exempted. But, by the Council of Lateran, 1215, only as to those lands they had before the council.

[2] The Acts do not extend, unless by special provision, to Easter offerings, mortuaries, surplus fees, or any mineral tithes. In the City of London there is a customary rent-charge assessed on each house in proportion to the rent, and payable though empty, and levied on each succeeding occupier. Fifty-one churches destroyed by the Great Fire have a fixed sum instead—an equal pound rate.

[3] Any clergyman by agreement with the landowner may

This rent-charge merges the same as an ordinary rent-charge.[1]

Tithes are only payable of such things as yield a yearly increase by act of God, 1 Rolle's Abr. 641, as grain, fruit, cattle, and underwood, and, as a rule, only payable but once a year. There are exceptions; thus tithe is due of saffron, though gathered but once in three years; of seeds which are sown upon the same ground and renewed oftener than once a year, as clover, which is paid as often as renewed. (Phil. Ecc. Law, 1488.) By the Common Law there is no payment as to animals *ferae naturae*, or animals merely kept for pleasure, or for things the substance of the earth, as minerals.

Tithes are—

1. **Praedial**—those arising from the ground, as grain, fruit, wood, hay, herbs.
2. **Personal**—those arising from the industry of man, *e. g.*, trades, fisheries, &c.
3. **Mixed**—those arising from things nourished by the land, *e. g.*, chickens, eggs, milk, calves, &c.

They are also—

1. **Great**—*e. g.*, hay, wood, corn.
2. **Small**—other prædial, and all personal and mixed tithes.

Prescription. Everything which lies in grant is capable of acquisition by prescription, for prescription presupposes a grant which has been lost. It is rather evidence of a former acquisition than an acquisition *de novo*. It is a claim by a person against a person; therefore a rector cannot prescribe for a marriage fee, nor the lord of a manor to raise a toll upon

take land instead of the tithe rent-charge, but not more than twenty acres in the same parish.

[1] Any tenant in fee or in tail of the tithes, or persons having a power of appointment over the fee, where the land and the tithes are settled to the same uses, may effect a merger. Also the owner of the glebe in some cases.

strangers, because these are claims by a person against the public; nor the inhabitants of a parish for a right of way (*Vestry of Bermondsey* v. *Brown*, L. R. 1 Eq. 204);[1] besides such things never lay in grant; such rights can be acquired by **custom**, which is a local usage.

To constitute a title by prescription at the common law it is necessary—

1. That the claim be founded on actual usage.
2. And that usage must be peaceable and uninterrupted.
3. And certain in its extent.
4. And either laid in a man and those whose estate he holds in certain lands (prescribing in **a que estate**) or laid in a man and his ancestors.

   The thing prescribed for in a que estate must be something incidental to the lands, thus he cannot prescribe for anything which lies in grant, and which cannot pass without deed or fine; but if laid in the claimant and his ancestors anything that lies in grant may be prescribed for. Moreover only a tenant in fee can prescribe in a que estate; a tenant for life can alone do so under cover of the tenant in fee: as by pleading that the tenant in fee had the right in question immemorially, and had granted the estate to him with its appurtenances, of which the right was one. But this is rendered unnecessary by the 5th section of the Prescription Act.
5. And enjoyed from time whereof the memory of man runs not to the contrary, which means from the reign of Richard I.; but in the absence of evidence to the contrary if enjoyed for twenty

[1] A right of lateral support to buildings from adjacent land can be acquired by prescription (*Angus* v. *Dalton*, L. R. 6 A. C. 740), and also a right to support from adjacent buildings (*Lemaitre* v. *Davis*, 19 Ch. D. 281).

years, the law would always have presumed that it was immemorial, and even when enjoyed for less, if there were corroborating circumstances; but the enjoyment must not be by the permission or without the knowledge of the adverse party.

The Prescription Act, 2 & 3 Will. IV. c. 71, now regulates the time necessary for prescription, and requires for rights of common and other profits from land, excepting tithes, rents, and services, thirty years uninterrupted enjoyment; any proof that it was first enjoyed since legal memory will not destroy the claim, as it would have done before the Act, but it will still be defeated in any other way in which it was defeated before, as by showing that it was by permission, or without the knowledge of the opponent; also the time of any disability, if the opponent shall be excluded from the reckoning; but an enjoyment for sixty years shall be indefeasible unless such enjoyment took place by virtue of some deed or written consent.

For rights of way or water twenty and forty years are respectively substituted for thirty and sixty years, in addition that when the land has been held for years (exceeding three), or for life, such term of tenure shall be excluded in reckoning the forty, if the person next entitled resists the claim in three years after his right commences.

Rights to air and light are indefeasible after enjoyment for twenty years, there being no extension in cases of disability.

This enjoyment must be one without an interruption acquiesced in for one year after notice. Proof that the party interrupted has communicated to the party causing the interruption, that he does not really submit to it, is sufficient to rebut the acquiescence. (*Glover* v. *Coleman*, L. R. 10 C. P. 108.)

CHAPTER VIII.

REVERSIONS AND REMAINDERS.

Reversions and remainders are estates in expectancy at the common law, that is, estates which will take effect at a future period, as opposed to executory interests, which are estates in expectancy under the Statute of Uses.

Differences between them. A reversion is that residue of an estate which when an estate smaller in quantity (see p. 2), is given away remains in the grantor, and which will fall into possession when that prior estate determines. A remainder is an estate which is limited by the same instrument as a particular estate, to take effect on its determination.

The chief difference between a reversion and remainder is, that in the one there is tenure and in the other there is not. Thus, if A, tenant in fee, grants to B for life, he will have given away a smaller estate than he has himself, for on B's death he will again repossess. This future estate is called his reversion, and B is the **particular** tenant—so called from being part or particula of the fee. Therefore a particular estate must be less than a fee. As B has a freehold, he has the seisin, and is entitled to the deeds. But supposing A grants to B for life, and then to C for life, and then to D in tail, the estates of C and D will be called remainders, and what will be left to A when D's issue fail is still his reversion. For an estate tail is considered certain to come to an end, and therefore it is less than a fee simple, and there can be a reversion after it. But if A gives away the fee, which is all he has, there is no reversion left. There is no tenure between the particu-

lar tenant and the remainderman, as they have nothing to do with one another. Every remainder must be created by the **same deed** as the particular estate, or else it is a conveyance of the reversion or a part of it, and not a remainder at all. Both reversions and remainders must be transferred by deed, for they are incorporeal hereditaments; there is one exception to this rule, *viz.*, conveying a reversion when the particular estate is a term for years; then a feoffment made with the consent of the tenant for years will do as well as a deed, for a term for years is a mere chattel, and the seisin is not parted with. [But in every case it was more usual to take a conveyance of a reversion by lease and release, instead of grant, in order to save the expense in future investigations of title of proving the existence of a particular estate when the reversion was conveyed. (Watk. Conv. 193 n., cor. ed.)] This reason is inapplicable now, as corporeal hereditaments lie in grant.

A further difference between a reversion and remainder is that the one arises by act of law and the other by act of party, for there can be no remainder without a conveyance.

Incidents. The incidents to a reversion are the oath of fealty, which is never exacted, and rent. The rent may be granted away, reserving the reversion, or *vice versâ;* by a grant of the reversion without mentioning the rent, the rent will pass, but a grant of the rent will not pass the **reversion.**

When a person creates an estate for years by demise at the common law, he has a reversion when the lessee enters, not before. But if he does it by a conveyance operating under the Statute of Uses, the lease takes effect without entry, and the reversion dates from the conveyance. (2 Cruise, T. 17, s. 7.) If a gift is a base fee, there is no reversion on it, but only a **possibility of reverter.** (Brown, Law Dictionary, p. 425.)

Kinds of remainders. Remainders are **vested and contingent.**

Vested remainders are defeasible and indefeasible.

Vested remainders. **A remainder is indefeasible** when it is ready to take effect immediately and cannot be defeated, as where Dale is given to A for life, remainder to B in fee. Here B has a disposable estate, and his death before A cannot in any way affect his interest.

A remainder is defeasible when, as above, it is ready to take effect, if the particular estate should determine directly, and it can only fail by its own determination (as if there is a grant to A for life, remainder to B for life, and B dies first, in which case B's estate is said to become divested); or some circumstance not connected with the premature failure of the particular estate, as the barring of an estate tail.

To constitute a remainder—

1. There must be a particular estate precedent to it, which must not be an estate at will.
2. The estates must pass out of the grantor at the same time.
3. The remainder must take effect when the particular estate determines, and neither later nor earlier. It must not abridge or defeat it.

There may be any number of remainders given at once, and in any order; thus Dale may be limited to A for life, then to B in tail, then to C for life, and so on; it being merely necessary to keep in view the laws against remoteness.

There will always be a reversion left unless the fee is given, whatever be the number of limitations; for the grantor has not given all he has until he has parted with the fee; and when he has done that, he can neither give away anything more, nor is there anything left in him.

The rule in Shelley's case. 1 Rep. 94, When a freehold (even a terminable life estate, such as an estate by the curtesy in gavelkind) is given, and by the same conveyance an ulterior estate (whether mediately

or immediately) is limited to the heirs or heirs of the body of the same person in fee or in tail, the words "the heirs" in such estate are words of limitation and not of purchase. Thus, "Gift to A for life, remainder to B for life, remainder to the heirs of A," A takes the fee and may dispose of it, subject to B's interest; and the rule will hold, although the intermediate estate is a fee tail, or in fact anything short of a fee simple. The rule does not apply to leaseholds, nor if one estate is equitable and the other legal; but it does if both are equitable, and it always holds in an executed and (unless there is anything to indicate a contrary intention) in an executory trust (*Lord Glenorchy* v. *Bosville*, 1 W. & T. Cas., notes on), with the exception of— 104, and Tud. Cas. Pry. 507.

(i.) An agreement[1] for a marriage settlement; for in this case equity considers, from the nature of the transaction, that the parties intend to benefit the children of the marriage, and if the husband took an estate of inheritance he would be able to defeat their expectations. But if a contrary intention appears on the face of the articles,[1] the Courts will abide by the rule. (*Papillon* v. *Voice*, 2 P. W. 471.)

(ii.) In a will, if it is clear from the expressions used that the rule is intended to be excluded. (*Leonard* v. *Sussex*, 2 Vern. 526.)

Contingent remainders.

A remainder is contingent when it is not ready to take effect, if the prior estate determines at once. It may be limited either upon an uncertain person, as in a gift to A

[1] Marriage articles, *i.e.* an agreement containing the heads of the marriage settlement, were common in the days of fines and recoveries, as frequently, owing to pressure of court business, a considerable time might elapse before the estate could be disentailed, and the marriage might take place before it was done, and the settlement, if made after marriage, was guided by them, and rectified if at variance with them, as the wife, after marriage, was not a free contracting party. They rarely occur now, except where a trustee can be found to act at once.

for life, remainder to the first son of B, a bachelor; or on an uncertain event, as to A for life, and after the death of B to C in fee. The gifts over will fail if B has no son or he is not dead when the life estate determines. If the event happens before that time, the remainder is turned in a vested one. Therefore it may be contingent at one time and vested at another. Owing to their uncertainty the law leans against contingent remainders, and for a long time did not permit them at all, and where from the construction it is doubtful whether a limitation is vested or contingent, it will always consider it vested. [Until recently they were not permitted to be double] (see *post*, Part ii. c. 1), and the laws against remoteness have always strictly applied to them. A contingent remainder is void unless it vests *the instant* the prior estate determines, if it does not vest sooner; and it must be limited on a freehold, for a term for years cannot support the seisin, and it will fail; the reason of its failing being that there is no one in whom the seisin can vest, and the estate will pass to the reversioner or person having next vested remainder.

[The ancient lawyers were puzzled by the question "What should become of the inheritance until the contingency happened?" However they settled the matter by deciding that it was in abeyance, *in graemio legis* or *in nubibus*. In modern times the doctrine is not so important.]

Contingency with a double aspect.

It has been said that no remainder can be limited after giving a fee. But if land is limited to A for life, if he have a son then to that son in fee, but if he has no son then to B in fee. This is called a **contingency with a double aspect**, and does not violate the rule, for both the limitations in expectancy are concurrent, and though they are remainders on the particular estate they are not remainders on one another.

Since 10 & 11 Will. III. c. 16, a **posthumous child** is considered born for the purpose of supporting a contingent

remainder, and a **right of entry** is considered capable of doing so, for forcible ejectment is not, in the eye of the law, a legal termination of an estate.

How disposed of— **How disposed of.**

1. It could always be **released**, for the law, not approving of it, was glad to get rid of it.
2. It was devisable and still is so.
3. It was and is assignable in equity for value.
4. [But it could not be disposed of by deed, for it was only a possibility. Nevertheless there was a circuitous mode of alienating, viz., by a fine.] When fines were abolished there was no mode at all till 8 & 9 Vict. c. 106, s. 6, expressly enacted that a contingent interest and a possibility coupled with an interest should be disposed of by deed; though supposing a married woman makes such a disposition she must conform to the provisions of the Fines and Recoveries Act.

[Owing to the uncertainty by wars and otherwise of any estate enduring till it determined naturally, a scheme arose to prevent the failure of contingent estates. This was effected by inserting limitations to trustees to preserve them, and the practice became common in almost every settlement. An estate would be given to A for life, and if his interest prematurely determined by forfeiture, surrender, or merger,[1] to trustees to preserve the contingent remainders, but to permit A and his assigns to receive the rents and profits for life, and after his death remainder to his first and other sons in tail, and then over in fee. By this means the estate tail would not be defeated, but the **Recent Acts.**

[1] Forfeiture was caused by A making a feoffment, or levying a fine or other ways (*post*, title Forfeiture—surrender), by A giving up his estate to the next vested remainderman—merger, by the fee, which the estate tail to the sons was expectant on, descending or somehow becoming vested in A before he had any children.

limitation to the trustees would uphold it till A died. If the contingent remainder was not ready when the life estate expired of its own accord the limitation to the trustees was ineffectual, for it was the **premature** ending only that could be guarded against.] 8 & 9 Vict. c. 106, s. 8, has rendered this assignment to trustees unnecessary, by enacting that a contingent remainder shall be capable of taking effect in spite of the forfeiture, surrender, or merger of the preceding freehold. Therefore a contingent remainder can now only fail by the contingency not happening at the time of or previously to the natural termination of the particular estate. But the tendency is to do away with the uncertainty of contingent limitations which are the cause of much inconvenience. A decided step has been taken in this direction by a recent Act, which provides that—

40 & 41 Vict. c. 33. "Every contingent remainder which would have been valid as a shifting or springing use or executory devise if it had not had a particular estate to support it as a contingent remainder, shall still take effect as one if the particular estate fails before the contingent remainder is ready." This provides for a case like the following:—"Gift to the use of A for life, and after his death to the heir of B. If A dies before B, the gift to B's heir will fail as a contingent remainder—for *nemo est haeres viventis*. If this limitation to the heirs of B had not been preceded by the gift to A, it could have taken effect as an executory interest (see part II. c. 11), and the object of the Act is still to enable it to do so. But it must still fail if it cannot take effect as an executory interest; *e.g.*, if the gift to B's heir is to depend upon the contingency of his attaining thirty years of age; for such a limitation would transgress the rule against perpetuities. (See part II. c. 1.)

In all limitations of this nature, the first thing to con-

sider is whether the gift will stand as a contingent remainder: if not, whether it is a good executory interest; for if it will not stand either way, it must still fail. Formerly, when it was capable of being construed as a contingent remainder, and failed subsequently, it could never be upheld as an executory interest. This is the defect which the Act has remedied.

CHAPTER IX.

ESTATES LESS THAN FREEHOLD.

Leaseholds. An estate for years is an estate which has a fixed ending, and it is considered to have a fixed ending although practically it may have an uncertain one; for example, a limitation to a man for one thousand years, if he or another may so long live, is merely a term, although in fact it is an estate for life. Under certain statutes a tenant for years, dropping with a live or lives, has advantages an absolute tenant for years has not. Thus he may be protector by act of law. (See p. 21.) Also he is a tenant for life under the Settled Land Act. A lease to B for as many years as C shall name is good, for it is reducible to a certainty, though at present uncertain. But a lease for as many years as C shall live is void *ab initio*, not being so reducible. A term is a mere chattel and not a freehold—it is smaller than the least freehold and will merge into it—however long the term may be. Yet a tenant for years has some advantage which a tenant for life has not; he may sub-lease for any period short of his own interest and devise the residue of his term, while a tenant for life can only make a lease for a fixed period binding on the remainderman as authorised by the Settled Estates Act of 1877, or the Settled Land Act, 1882. (See p. 32.) Estates for years are of two kinds: long terms for one thousand years or so, which practically differ little from freeholds, and the short terms in everyday use. As a term for years must have a fixed ending, herein it differs from a freehold. Besides being a mere chattel interest it has none of the incidents of freehold property; it could always be devised

as freely as other personalty, and could be limited in futuro (if no day for commencement is named it begins from the making), as there was no seisin in such an estate, the tenant being merely possessed. In the Norman times these terms for years were considered of no importance, as military tenants would not accept such holdings, and though in modern days they have become important, yet they devolve on the executor, and are still considered chattels, except where, for certain purposes, under a few statutes (expressly by the statutes, or by decisions on them), they are reckoned real estate. Thus by—

When considered as realty.

(α) The Wills Act, 1 Vict. c. 26, they pass under a general devise of realty.

(β) The Succession Duty Act,[1] succession, and not legacy duty is paid on them.

Succession duty.

[1] 16 & 17 Vict. c. 51. Succession duty is a duty payable on all dispositions or devolutions of real property, whereby any person became beneficially entitled thereto, by reason of any death after 19th May, 1853, either immediately or after any interval. The interest of a successor is considered to be of the value of an annuity equal to the annual value of such property during his life or for less period; and is valued according to the tables set forth in the Act, and is payable in eight half-yearly instalments, the first coming due twelve months after the succession, and the rest at intervals of six months; but any instalments not yet due stops in the event of death, unless the successor could have disposed of the property by will (*Att.-Gen.* v. *Hallett*, 2 H. & N. 368). The rates are precisely the same as in legacy duties; *e.g.*, lineals pay 1 p. c.; brothers and sisters and their descendants, 3 p. c.; uncles and aunts and theirs, 5 p. c.; great uncles and aunts and theirs, 6 p. c.; other persons, 10 p. c. On leaseholds, as mentioned above, succession and not legacy duty is payable, but realty devised in trust for sale is subject to legacy duty, as in contemplation of equity it is already personalty.

Persons exempted from paying succession duty are:—

- The royal family.
- Husbands and wives succeeding to one another.
- Those who pay legacy duty on the property, as in the case of realty devised for sale.
- Those whose whole succession from the same predecessor is under 100*l.*, or where any succession is under 20*l.* (s. 18).
- Those holding life policies on lives of others, and post obit bonds (s. 17).

A receipt and certificate in discharge of the whole duty exonerates a *bonâ fide* purchaser.

(γ) *Attorney-General* v. *Greaves*, Amb. 155, they fall under the Mortmain Act. (See part II. c. 1.)

(δ) The Exoneration of Charges Act (40 & 41 Vict. c. 34), they fall under Locke King's Acts. (See p. 45.)

(ε) 27 Eliz. c. 4, a voluntary conveyance of them is bad against a subsequent purchaser for value. (See part II. c. 5.)

(ζ) (*Foster* v. *Hale*, 3 Ves. 696), they have been held to fall under s. 7, Statute of Frauds. (See *post*, part II. c. 11.)

They also fall under s. 4 of the same statute, which provides that "every sale of land, tenements and hereditaments, or any interest therein," shall be in writing signed by the party to be charged, "or his agent lawfully authorized."

(η) Further certain equitable doctrines applying to freeholds apply to leaseholds. Thus—

(α) The vendor has a lien on leaseholds for unpaid purchase-money, as he has on freeholds; he has none on other chattels. (*Winter* v. *Anson*, 3 Russ. 492.)

(β) Equitable assignees rank in order of date, as in equitable assignments of land, and not according to priority of notice of their assignments to the legal owner, as in personalty. That is, in pure personal personalty, as consols, when a person takes a charge or assignment, of an equitable interest in personal property, he must give notice of it to the legal owner; if not, he is postponed to a person who subsequently takes a charge, as by not giving notice he has not afforded that person an opportunity of knowing of his prior claim. The reason why this is not necessary in land and leaseholds is, because

the *cestui que trust* may be in possession, and it is conceivable that the chargee or assignee may not know of the existence of any outstanding legal estate.

Long terms. Long terms generally occur in settlements, and are used for the purposes of securing pin-money, jointures, and portions for younger children. The term is vested in trustees to enable them to pay the above incumbrances out of the rents and profits, or to raise them by mortgage or sale. These powers will only arise if the owner of the property will not pay the incumbrances when due. He can dispose of the property, and it will descend as in ordinary cases, subject to the term which looms over it, and if the money is not paid at the proper time the term will spring into existence and deprive him of the enjoyment for one thousand years, or at least till he pays. Powers of distress and entry, powers of sale, mortgage, and demise, would have achieved the same purpose equally well, but these terms have always been used instead.

Satisfied terms. When the money is paid the term is considered satisfied, its object being accomplished. If there was a proviso for cesser it always disappeared of its own accord; if there was not such a proviso, by conveying it to the owner, it would merge into his freehold and thus become extinguished. Indeed sometimes it might accidentally merge before its object was accomplished, as if the trustee of the term by some means became the freeholder, but equity would look after the rights of the wife or younger children; and now by the Judicature Act of 1873, 36 & 37 Vict. c. 66, s. 25, sub-s. 4, no term shall merge at law when the beneficial interest is not extinguished in equity. (It was often found convenient not to get rid of the term at all, but to keep it on foot to attend the inheritance, that is, to desire the trustees to hold it for the benefit of the freeholder, who if he wished to sell could always get a higher price if a term was attached, because the pur-

chaser on having the term assigned to a trustee of his choosing would then have been safe against any latent incumbrance, such as a rent-charge, which the vendor might have created; for the term was prior to the vendor's own estate, and the holder of the rent-charge must have waited for its termination. If the purchaser knew of the rent-charge the term was useless against it; but it prevailed over the widow's claim to dower although he knew that the vendor was married. Every term not merged in which there was no proviso for cesser was considered constructively attendant on the inheritance, although not actually assigned to a trustee.) (See Williams, R. P., 13 ed., 419 *et seq.*) These terms thus working injustice were put an end to by the Satisfied Terms Act, 8 & 9 Vict. c. 112, which extinguishes them when satisfied for ever; but the Act does not interfere with those in existence before it was passed (s. 2), and as a forty years' title is still requisite, the old ones will continue to be an impediment till 1885.

In a very long term it is practically impossible that any evidence of the title to the reversion in fee can exist at the end of it; and therefore by s. 65 of the Conveyancing Act, 1881, whenever a residue unexpired of not less than 200 years subsists, which originally was 300 or more, the owner is allowed to turn it into a freehold by a declaratory deed, without giving any compensation to the reversioner, provided there is no rent incident thereto. The fee simple so created is subject to the same trusts and provisions as the term.

The Conveyancing Act, 1882, s. 11, further provides that this shall not include any term liable to be determined by re-entry for condition broken; nor any term created by subdemise out of a superior term, itself incapable of enlargement.

Short terms. Short terms are the ordinary leases in common use. They are sometimes for a year and sometimes for a

number of years.[1] Notice must be given by either party to determine the tenancy, which must be six months before the end of the current year. A lease for a year and so on from year to year cannot be determined till two years, as no notice can be given during the first year. No formal words are required for the making of a lease, and an agreement for a lease may be in writing simply. [Formerly an agreement, or memorandum of agreement for a lease merely gave the lessee a right to have a lease granted to him.] The recent case of *Walsh* v. *Lonsdale* (21 Ch. D. 9, C. A.), decides that such an agreement creates a regular lease, and not merely a tenancy from year to year on acceptance of rent, and that the landlord has a right of distress under it—thus doing away with the main differences between a lease and an agreement for one. It has always been required that the lessee must enter to complete his tenancy, and before entrance he has merely an **interesse termini**, or right to have a lease granted to him, though this is not necessary if the conveyance by which the lease is granted operates by virtue of a bargain and sale,[2] or any other conveyance under the Statute of Uses. Every lessee is estopped from denying his landlord's title though he may show it has determined. If ejected by a stranger his remedy is against the landlord and not against the ejector.

Underleases. The lessee may again lease, and such sublessee is a stranger to the lessor, there being no privity between them. The lessor has, however, a common law right of distress on the goods of the sublessee. He makes his covenants with the lessee and is liable to him on breach of them; and if ejected his remedy is against him. If the lessee's term determines, the rent being incident to it

[1] The lessor's solicitor prepares the deed. This rule is the converse to that in sale, for there the purchaser's solicitor prepares the conveyance.

[2] In order that it may be a bargain and sale for a term, there must be some payment on taking the lease.

determines at the same time. Therefore by the common law if the freehold is acquired by the lessee his term is merged in it and he can claim no rent from the underlessee. In the case of **leases surrendered in order to be renewed** the underlessee would often refuse to surrender in order to continue to hold after the renewal of the lessee's term without paying rent. A statute of George II., however, provided that the new lessee should have the same remedy against the underlessee in regard to the rents and covenants as the old lessee; and 8 & 9 Vict. c. 106, s. 9, has provided that when the reversion on a lease has been merged or surrendered the next estate shall be deemed the reversion to preserve the incidents of the one which has disappeared. Thus if A, termor for twenty years, leases to B for ten years and then surrenders his term to the freeholder, B must pay his rent to the freeholder.

Covenants. In leases there are inserted certain covenants, as to pay rent, and to perform certain acts, as to repair. The lessee is always liable for these covenants: but an assignee from him is only liable if they run with the land.

They are said to run with the land when the liability to perform them, or the right to take advantage of them, passes to the assignee of the land. (*Spencer's case*, 5 Rep. 17, a.) If the covenants relate directly to the land, they will in every case run with it, there being privity of estate between the covenanting parties. If there is a covenant to do any act upon the premises, the assignee is only liable if the lessee has covenanted for himself and his assigns. If it is to do any collateral act, as to ring a bell at certain seasons on another property, the assignee will in no case be responsible. The liability of the assignee only continues until he himself again assigns, and therefore he may free himself by assigning even to a beggar; but the assignor continues liable until the expiration of his term, therefore he should make separate covenants with the assignee to indemnify himself.

By the Conveyancing Act, 1881, ss. 10—12, the benefit of the lessee's covenants and the burden of the lessor's —as far as the lessor has power to bind the reversioner—shall run with the reversion in case of severance, and be apportioned (see p. 100).

Breaking any covenant, however trivial, once caused a forfeiture. But now by the Conveyancing Act of 1881, s. 14, no right of re-entry or forfeiture under any stipulation in a lease shall be enforceable, unless the lessor gives a notice to the lessee, and the lessee fails in a reasonable time to repair the breach, if he can, and to make a reasonable compensation to the lessor; and further the Court may relieve the lessee upon reasonable terms when the action is brought. Breach of a covenant against assigning, or of one in a mining lease giving the lessor power to inspect the books, machinery, &c., or of a covenant giving power to re-enter on bankruptcy of or execution against the lessee, is not included; nor is the law relating to re-entry or forfeiture on non-payment of rent affected (see p. 97). The section is retrospective, and no stipulation can avoid its operation.[1]

An **actual waiver** of a breach of covenant put an end to **Waiver.**

[1] The former law as to relief,—now repealed by the Act of 1881, Part 1, sched. 4, was as follows: —By the fourth section of Lord St. Leonards' Act, 22 & 23 Vict. c. 35, extended to the Common Law Courts by 23 & 24 Vict. c. 126, s. 2, power was given to the Court to relieve against a forfeiture for breach of covenant to insure, if— (22 & 23 Vict. c. 35, s. 4.)

1. The breach was accidental.
2. No damage resulted.
3. There was an insurance on foot when the application was made.
4. If it was the first time of asking.
5. And there has been no previous waiver of the forfeiture out of Court in favour of the person seeking relief. s. 6.

Also, by section 7, if fire happened and the lessee had made some other insurance, the landlord was to have the benefit of it. s. 7.

And by section 8, on the purchase of a lease, a written receipt for the last rent preserved the purchaser from any liability on breach of covenant to insure (which breach he was not aware of) committed before the completion of the purchase. Also there has been relief against forfeiture for non-payment of rent since the time of Geo. II. s. 8.

the right of re-entry entirely until 23 & 24 Vict. c. 38, s. 6, provided that it should not extend to subsequent or other breaches; an implied waiver never stopped forfeiture for any breach after the waiver. The effect of permitting a breach or giving licence to do some act which could not be done without licence, had the same effect as an actual waiver; all chance of re-entry was for ever gone. True, fresh provisoes could be made for future breaches, but this
s. 1. was inconvenient, and Lord St. Leonards' Act remedied it
s. 2. by providing that the licence should only extend to the particular breach, and that a licence given to one of several lessees with respect to only part of the property set should not interfere with the rights of re-entry as to the others or as to the remainder of the property.

Emblements. A tenant for years is entitled to emblements, when his term is cut short by the determination of his landlord's estate, and in fact whenever his lease is for an uncertain period. 14 & 15 Vict. c. 25, s. 1, allows tenants at a rack rent to hold until the end of the year of their tenancy on the same conditions as before, and then quit as though the lease had determined by effluxion of time. The rent is to be fairly proportioned between the two landlords. The Act only applies where the landlord's estate is of an uncertain nature.

Assignment. 22 & 23 Vict. c. 35. By the 21st section of Lord St. Leonards' Act, a person may assign leaseholds and all personalty to himself jointly with another; (before this time they would have to have been conveyed to a third person, who would then have conveyed them back to the assignor of the other party.)

There are no estates in personal property, and consequently at law leaseholds cannot be given to one person for life, remainder to another; the first will take the absolute interest. There is one exception to this: *viz.*, a devise of a term to one for life, which may shift away and vest in another as an executory bequest; and even if there is no

executory bequest over, in this case the first person will only be entitled to a life interest, and the residue will go to the executors and administrators of the testator. In equity, however, where the intention of the donor is carried out, limitations in personalty may be made in the same manner as the law allows in realty, and by the Judicature Act of 1873, s. 25, sub-s. 11, equity rules now prevail.

It was decided in *Leventhorpe* v. *Ashbie* (Tudor, Cas. Pry., p. 763), that there could be no estate tail in a term; and a devise to that effect would vest the absolute interest in the devisee. **Tud. Cas. Pry. 763.**

The Agricultural Holdings Act, 1883, 46 & 47 Vict. c. 61, repeals the Act of 1875, and alters the previous law as to— **Agricultural Holdings Act, 1883, 46 & 47 Vict. c. 61.**

1. The right of the tenant as to **fixtures** and buildings he has erected. He may, after all obligations are settled, remove fixtures erected after the Act, for which he can have no compensation under the Act, on giving a month's written notice, and subject to the landlord's election to purchase, making good all damage (there being no restriction as formerly on steam engines).

2. The **length of notices to quit**—being now one year.

3. The procedure under a **distress**, limiting the landlord's right to one year. Live stock are not distrainable if there is other distress. Agricultural and other machinery, and live stock on the premises for breeding purposes, and being the property of a third person, are absolutely privileged. Appraisement is abolished, and the distrained goods shall, on the written request of the tenant, be removed to some proper place and sold. The time to replevy is to be extended to fifteen days on the written request of the tenant.

4. **Compensation for Improvements**—that is, the right of the tenant to compensation for the unexhausted value of capital he has laid out. Compensation is paid according

to the value of the improvement to the landlord or incoming tenant when claimed. In this respect the Act is compulsory; otherwise it is permissive.

Schedule 1, Part I., mentions fourteen improvements for which the written consent of the landlord must be obtained before execution, which he may give on any terms he pleases. The landlord and tenant may make a fair agreement as to compensation if they please. Part II. relates to drainage—notice to the landlord to be given before execution. Part III. mentions eight improvements, for which the consent of the landlord is not required, and whose effects are soon exhausted, as chalking and liming.

5. The Act applies to **all agricultural or pastoral tenancies,** irrespective of size, held on yearly or longer tenancies.

Agreements inconsistent with the Act are void.

The right to compensation only arises when—

(i.) The tenant quits his holding on the determination of the tenancy.

(ii.) The improvement is made on the holding.

There is no compensation (with exceptions), for improvements made within one year of quitting.

Estates at will.

Estates at Will.—If one man lets land to another to hold at the will of the lessor, or as long as both parties like, the tenancy is called a tenancy at will. As the tenant can be turned out at the will of the lessor, so, on the other hand, he can leave when he pleases. He can reap what he has sown, and is not liable for permissive waste. This tenancy may be constituted by verbal agreement. It is determined by the death of either party, and also by any act of ownership by the landlord which is inconsistent with the nature of the estate; as entering and cutting down trees, or making a lease to commence immediately, or by desertion or assignment by the tenant. There may be a compensation reserved, but it must accrue *de die in diem;* if there is yearly rent, though payable even quarterly, and nothing

Richardson *v.* Langridge, Tud. Cas. Pry. 4.

is said about what the tenancy is to be, the law will construe it to be from year to year; for it leans against tenancies at will, and will always when it can turn them into terms for years.

Estates at sufferance.

Estates at Sufferance.—A tenant at sufferance is he who continues in possession after his estate has determined: *e.g.*, if a man makes a lease at will and dies, the estate at will is thereby determined; but if the lessee does not leave he becomes a tenant at sufferance. Such an estate arises by implication of law only. These tenancies are now rare, for two statutes passed in the time of George II. enact that a tenant holding after demand and notice in writing given shall pay double the yearly value of the land; and if he gives notice to quit himself, and does not deliver up possession at the time he mentions, he shall pay double his former rent.

Some persons who continue in possession after their interest is over are not tenants in sufferance, but trespassers: *e.g.* (1.), the husband seised in right of his wife, who holds over without the consent of the person next entitled. (6 Anne, c. 18, s. 5.) (2.) Also there can be no tenant at sufferance against the Crown, and the person continuing in possession is a trespasser. (3.) So also is the tenant *pur autre vie* holding after the *cestui que vie* is dead; and (4) a guardian holding over after his ward's death.

Special chattel interests.

Chattel Interests created for special purposes.—Such interests are—

1. A devise of land to the executors of a testator for payment of debts—determining when the debts are paid.
2. A right of entry on land, when a rent-charge reserved out of it is in arrear.

    By the Conveyancing Act, 1881, s. 44, when the

payment is in arrear 21 days the land may be entered and distrained on, and if in arrear 40 days, entry may be made and the income taken; and, by way of further securing payment, the land may be demised to a trustee for a term to raise the money due by mortgage, sale, or demise.

3. A demise by a man to his wife till his son comes of age, to provide his children with necessaries.
4. Estates by *elegit*, statutes merchant, staple, &c. (See p. 52.)

PART II.—TITLE.

By Act of Party.	Voluntary alienation.	1. Deed *inter vivos*. 2. Matter of record. 3. Special custom. 4. Testament.
	Involuntary alienation.	1. Seizure for debt. 2. Bankruptcy. 3. Forfeiture.
	By occupancy.	
Act of Law.	Escheat. Descent.	

CHAPTER I.

BY VOLUNTARY ALIENATION.

What are Alienated, and who can Take or Give.

Origin of a person's possession.

If a person is asked by what right he holds his land, he must answer either—

1. By no right. I am a trespasser, and turned out the proper owner. In which case he is liable to be ejected by process of an action for recovery of land, and the rightful owner reinstated; or,
2. I found it empty and took possession. In which case he is also liable to be ejected, unless his occupation has been long enough to bar the right of the true owner by virtue of the Statute of Limitation. (See c. xiii.)
3. By act of law, as descent, and in those cases mentioned in c. ix.

4. By being the alienee of another.

Alienation is voluntary or involuntary. (See *Tabular Analysis for the kinds of each*).

Voluntary alienation.

I. **Voluntary.**—In treating of the subject of voluntary alienation there are four points to be noticed—

1. The restrictions and conditions which the alienor may impose. Thus, where a testator devised to his son in fee, adding that if he wished to sell, the testator's wife should have the option of purchasing at a certain price—also that if he wished to lease, she should have the option of being the lessee, it was decided that these provisoes were void, as being repugnant to a devise in fee. (*Re Rosher*, L. J., 1884, p. 79.) He cannot impose upon the alienee a condition that he in his turn shall not alienate. This brings us to consider to what length of time the law permits property to be tied up.
2. As to what may be alienated. As a general rule it may be laid down that the alienor must have some actual or potential property in the subject. The same rules hold in regard to personalty. For instance, a man cannot sell a corpse, for that is not capable of ownership; nor public property; nor the property of another, with the sole exception of the case where A gives B's property to C, and his own property to B; here B is put to his election in equity whether he will abide by or disavow the instrument; if he takes A's gift he must give up his own, for one cannot blow hot and cold in a breath; but he is allowed compensation for any difference in value whichever way he chooses. (*Streatfield* v. *Streatfield*, 1 W. & T. Cas., p. 369.)
3. What persons or what objects are or were ever

under a total or partial disability to acquire, to hold or to sell.

4. The modes in which realty could and can at present be aliened, and the formalities which the law requires to be observed.

Of these in detail.

I. To what extent property can be tied up.

1. It has been said that any prohibition to alienate imposed on the grantee is void, as being repugnant to the nature of the estate; but he may be forbidden to alienate in favour of a particular person (though a direction to do so in favour of a particular person only would not stand) and restricted from doing so in a particular time. (*Bradley* v. *Peixeto*, Tud. Pry. Cas., p. 858.) Landed proprietors have always been desirous that their estates should remain for ever in their families, and have done their best to achieve this object. Their intentions have been frustrated by the laws.

To prevent remoteness in the vesting of interests.

Common Law Rules.

Anything in the way of a contingent remainder was not favoured in early times; in fact it is doubtful whether they were allowed at all until the close of the Lancastrian period;[1] and when allowed they were not permitted to be remote. A grant to the child of an unborn person, according to Lord Coke, was expressly forbidden, and still remains so as being a **double possibility, or a possibility upon a possibility**, for they considered it too improbable that a specified individual now not *in esse* should not only be born but that he should also have a child. However, if such a limitation, being a gift of an *estate tail*, and following a gift of a life estate to the unborn person himself, is made by will, it will be upheld on the doctrine of *cy près* (which

[1] The late Mr. Williams said he had not been able to find one instance until the time of Hen. VI. (W. R. P. part ii. c. ii. p. 263).

means adhering as closely as possible to the intention of the testator), and an estate tail will be given to the first unborn person, and limitations of a similar nature occurring in executory trusts will be upheld by equity. (*Humberston* v. *Humberston*, 1 P. Wms. 332.) [Formerly all double possibilities were bad, as a grant to an unborn son who is named Mark, or has red hair,] but this is not now the case (*Cole* v. *Sewell*, 2 H. L. Cas. 186), the instance of the limitation to the offspring of an unborn person being alone preserved for the purpose of avoiding remoteness. The grants above mentioned must of course follow a life estate or estate tail previously given, for no remainder can be valid unless it vests during the continuance of the particular estate, or *eo instante* it determines. Any interest arising on the termination of an estate tail, or condition annexed to it, is excepted from the above rule, for it is barred if the estate tail is barred, and therefore the property is not tied down indefinitely; for the object of these rules is to favour alienation, which is prevented when some remote contingency hangs over an estate; for no one would buy from the present owner, as the happening of the possibility would put an end to his interest, and no one would buy from the contingent remainderman, for his contingency might never become an estate at all.

After the Statute of Uses was passed and executory interests were grafted into the common law, by their means and that of powers of appointment an opening was again afforded for posthumous power over property and restricting its free disposition, to prevent which it was established by the **Rule against Perpetuities** that *all property whatever* (except remainders—already provided for as above-mentioned) must be limited so as to vest in a life or lives in being, and twenty-one years after allowing for gestation, if gestation exist, or twenty-one years independently of any life.

Cadell *v.* Palmer, Tud. Cas. Pry. 360.

Thellusson Act,

The Thellusson Act, passed by Lord Loughborough, in

consequence of the will of a banker named Thellusson (who, keeping within the above rule, directed his income to be accumulated during the lives of many persons, some great-grandchildren, and to vest in descendants living at their death) provided that no income should accumulate for longer than— 39 & 40 Geo. III. c. 96. Griffiths v. Vere, Tud. Cas. Pry. 430.

1. The life of the donor, or
2. Twenty-one years from his death, or
3. During the minority of any person living or *en ventre sa mere* at his death, or
4. During the minority of any person who under the trusts directing such accumulation would, if of full age, be entitled.

The above periods are alternative, and one or the other may be selected at option.

Provisions for payments of debts, raising portions for children, and directions relating to the produce of timber are excepted from the Act.

Any violation of the rule against perpetuities makes the limitation—the limitation which breaks it (not the whole limitation)[1]—entirely void; but if the Thellusson Act is disobeyed, the excess alone will be bad; and though, as a matter of fact, the rule against perpetuities is not broken, yet the clause will not take effect if it possibly might have been. Thus, suppose a gift to the heir of A, a person in being, when he attains twenty-five. On A's death his eldest son is over that age. Still the gift to the son will be void, because it might have so happened that he would have been under four at his father's death, thus tying up the property for longer than a life or lives in being and twenty-one years after. Suppose A bequeaths money to trustees to pay the income during B's

[1] Thus in a devise to A., remainder to the heir of B. at twenty-five, the remainder to the heir of B. is void—not the devise to A.

life to B or his children, or, if they please, to accumulate it with the capital, and on his death to pay the capital to such children as are then living; if the trustees accumulate and B dies in twenty-one years, this devise will take effect; but after that time no instalment can be accumulated.

The income released goes—

1. Where there is an absolute gift of the property—to the donee.
2. Where the accumulation is the residue—to the next of kin.
3. Where it is of specific property with a subsequent residuary gift—to the person who takes the residue.

The Court of Chancery always recognizes the right of persons who attain twenty-one to enter into the enjoyment of property given to them by will, notwithstanding any direction by the testator that they are not to enjoy it until a later age, unless, during the interval, the property is given to another; or unless the property is so clearly taken away from them till a later age, so as to induce the Court that as to the previous rents and profits there has been an intestacy; consequently any direction postponing the enjoyment of a person absolutely entitled will be struck out of the will. (*Gosling* v. *Gosling*, Johns. 265—Per Page Wood, V.-C.)

II. What property cannot be alienated.

2. Some uncertain interests were not formerly alienable at law (*secus* in equity), *e. g.*, a possibility coupled with an interest, a right of entry, &c., but they could be released, as in that manner impediments to the free transfer of estates were got rid of. 32 Hen. VIII. c. 34, made a right of entry on breach of condition assignable, and the others were indirectly transferred by a fine; when the Fines and Recoveries Act abolished fines, however, they could not be transferred at law anyhow, until 8 & 9 Vict.

c. 106, s. 6, made all future and contingent interests transferable by deed.

There are still a few exceptions to the general licence to alienate.

(i.) Titles of honour, public offices, &c., where the gifts are made because of personal qualifications, the protectorship of a settlement, a power, &c., which are not estates at all, never could nor can now be assigned.

(ii.) Also, as stated on p. 22, a tenant in tail after possibility of issue extinct, and one where the reversion is vested in the Crown, cannot bar the entail.

(iii.) Further, alienation may be indirectly prevented by an estate being limited with a clause that it shall divert into another channel on the donee attempting to dispose of it.

(iv.) Lastly, a married woman cannot dispose of property which is given her without power of anticipation (but see *post*, p. 146).

III. Who are under disability to take, &c.

3. If land is given for an illegal purpose the gift is void, *ab initio*. But there are certain objects a gift to whom is not entirely void, but the policy of the law has placed their capacity to acquire under certain restrictions; the chief of these are religious corporations and charities, gifts to which are termed alienations in—

Mortmain.

Mortmain.—To enable corporations to become possessed of land a licence from the Crown and the lord was necessary, because, as they could not die or be attainted, or perform any services, the feudal advantages were lost. The land was said to be in dead hands. Thus licences were necessary even before the Norman conquest. If no licence was obtained the land was forfeited. But the power of the clergy in the early Norman times was great, and in spite of the charter of Hen. III., which expressly declared that all such gifts should be void, we find them

evading it by taking long leases for years, or buying in lands that were held of themselves as lords of the fee. Besides the charter did not include corporations sole. But **De Religiosis** (7 Edw. I.) enacted that *no person* should by any ingenuity appropriate to himself lands in mortmain on pain that the immediate lord, or if he did not in a year the lords paramount in turn, and the king finally, should enter. To evade this the religious houses set up a fictitious title to the land, and brought an action against the tenant, who wished to make it over to them, and who, of course, colluded. This was the origin of common recoveries. But Stat. Westminster II. (13 Edw. I. c. 32) declared that a jury should try the true right, and the land as before should be forfeited if it was not found to be in the religious house; and Quia Emptores also expressly exempted alienations in mortmain from its operation. But the ingenuity of the clergy instituted a new device, viz., that the lands should be granted to nominal feoffees to the use of the religious houses. This was the beginning of uses, the foundation of modern conveyancing; and thus the clergy invented two of the forms which for centuries have held a most conspicuous place in English real property law. But they did not long obtain any benefit from uses, for 15 Rich. II. enacted that the uses should be forfeited like the lands themselves. These Acts applied to all corporations, whether eleemosynary or not, but not to gifts to private trustees, for trusts were then in their infancy. The practice springing up of giving property to charities through the instrumentality of trusts, and being much abused when trusts came into common use, necessitated new law on the subject, and hence, in the reign of George II.,

Charities. **The Mortmain Act**, inappropriately so called,[1] was passed

[1] The Charitable Trusts Act would be more applicable.

to prevent persons in their last moments from being imposed upon—locking up land and disinheriting their lawful heirs (*Att.-Gen.* v. *Day*, 1 Ves. 223, per L. Hardwicke); it provided that gifts of realty and whatever savours of it[1]—in fact of every kind of property excepting pure personalty, if in favour of objects of an eleemosynary nature, should be void unless made— 9 Geo. II. c. 36.

1. By deed indented, and
2. To be sealed and delivered before two or more witnesses
3. Twelve months before the donor's death (or if stock, to be transferred into the public books six

[1] The following are instances of gifts which have been held to be invalid as savouring of realty:—

1. A legacy of money to arise from the sale of land.
2. A devise of rents of realty to accrue due.
3. A bequest of money to be laid out in building a school unless the necessary land is already in mortmain.
4. A bequest that money given to a charity should be laid out at interest on mortgage.
5. A vendor's lien.
6. A bequest to a person on condition that he convey land to a charity (*Att.-Gen.* v. *Davies*, 9 Ves. 535).
7. A bequest of money to exonerate land in mortmain, such being the purchase of a charge for the benefit of a charity.
8. Bequests of money secured on turnpike or canal tolls, poor rates, county rates, borough rates, mortgages of canals and railways, and duties payable to a dock company, bequests of the profits arising from mooring chains on the Thames—of navigation shares in canals and rivers when realty.
9. A devise of the vendor's lien—hence unpaid purchase-money cannot pass.

The following are instances of gifts which have been held valid:—

1. A bequest of arrears of rent.
2. A bequest of money for the erection of buildings on land already in mortmain.
3. A bequest for the endowment of an existing church.
4. A bequest of an annual sum to establish a school to educate poor children.
5. When it is discretionary and not compulsory for the trustees to invest in realty.
6. A bequest of a policy of assurance, although the assets of the company consist of realty.
7. A bequest of arrears of rent or of the apportioned part of rent at the testator's death.

months before the donor's death), unless the gift is for value paid at once, and

4. Enrolled in Chancery in six months after its execution,
5. To take effect in possession
6. Without any power of revocation or any reservation for the benefit of the donor.

The two universities and their colleges, and Westminster, Eton, and Winchester, are excepted from the Act.

This Act, it may be observed, differs from the Edwardian Acts in one or two respects—

1. That it applies to eleemosynary gifts, while they applied to gifts to corporations.
2. That the gift is void if its forms are not complied with, while under the old Acts the property was forfeited.
3. That its object is to guard the interests of persons who should claim under the donor; while the old Acts were to guard the interests of those under whom he claimed.

Statutes relaxing the Mortmain Act.

Statutes have since been passed modifying this stringent enactment. Their objects are either to relax its formalities,

I. In favour of all charities, as—

1. 9 Geo. IV. c. 85. Validating past purchases for value, although without an indenture attested and enrolled.
2. 24 Vict. c. 9, which dispenses with the necessity of an indenture, and allows the reservation of a nominal rent or of mines, minerals, or easements, or of the benefit of covenants as to repairs, &c., and re-entry on their breach. It renders a deed unnecessary for copyholds, and allows the reservation of a rent with or without a right of re-entry on nonpayment, as consideration on a con-

veyance for value, and requires that the grantor must reserve the same benefit for his representatives as for himself.

3. 27 Vict. c. 13, permits the enrolment of a subsequent deed by which the trust appears when the original has been lost or destroyed (s. 3), and dispenses with execution twelve months before death for conveyances for value consisting of a rent. Until this Act was passed, if the vendor had died in twelve months the conveyance would still have been void, although there was a rent.
4. 35 & 36 Vict. c. 24, which provides for the incorporation of trustees of charities for religious educational purposes, &c., by application to the Charity Commissioners, and for their becoming a body in perpetual succession, with power to acquire and hold; but by sect. 1 it shall not make any gift valid which would have been void under the Mortmain Act. It also allows the Clerk of Enrolments in Chancery to enrol any charitable conveyance, if satisfied that the omission to enrol arose from ignorance or accident, and that the conveyance is one for value.

II. Or to exempt certain gifts partially from the Act. Thus 45 Geo. III. c. 101, allows five acres to be given for churches by deed enrolled or will executed within three months before death. Further, by the *Literary and Scientific Institutions Act*, 1854 (17 & 18 Vict. c. 112), there are facilities for the conveyance of one acre or less for scientific and literary institutions, for adult instruction, establishment of reading rooms and general diffusion of useful knowledge. Under the *Recreation Grounds Act*, 1859 (22 Vict. c. 27), conveyances to trustees are allowed for adult and juvenile recreation. The *Religious and other Buildings Sites Act*, 1863 (31 & 32 Vict. c. 44), has pro-

vided for the acquisition of two acres or less by associations for religious, scientific, educational and analogous charitable purposes as sites for buildings. The *Public Parks, Schools and Museums Act* (34 Vict. c. 13), allows a gift of twenty acres for public parks, two acres for museums, and one for schools, to be made by deed or will executed twelve months before death, and registered in the books of the Charity Commissioners within six months after coming into operation. The *Public Worship Sites Act*, 1873 (36 & 37 Vict. c. 50), allows one acre or less, not part of a pleasure ground attached to a mansion house to be conveyed as a site for divine worship, or a minister's residence or burial place.

III. Or to dispense with the Act wholly in favour of certain bodies—as the British Museum, 9 Geo. IV. c. 39; Greenwich Hospital, St. George's Hospital, 10 Geo. IV. c. 35, s. 37. It has also been decided that the statute does not apply to conveyance of land already in mortmain. (*Ashton* v. *Jones*, 6 Jur. N. S. 970.)

Charities in some respects favoured.

Although eleemosynary objects may thus appear to be hardly dealt with, yet they are in some respects expressly favoured, especially in equity. Thus—

Corbyn *v.* French, Tud. Cas. Pry. 456.

1. They do not from their nature fall within the rule against perpetuities. Therefore, a gift to a charity may be made dependent on a condition precedent involving the occurrence of an uncertain event. If there is an immediate dedication to charity, however general, the particular application of the fund may be directed to take effect on an event which may never happen—as where a testatrix expressed her intention to return her money in charity to God who gave it, and then bequeathed it to trustees upon trust, when land should be given for the purpose, that an almshouse should be built.
2. When there is a gift by will to a charitable object,

which is contrary to the policy of law, or for some reason cannot be accomplished, the Court by *cy-près*[1] will give the money to some kindred object and supply defective directions, unless—

1. It is clearly indicated that the testator did not so desire; and the failure of the object in his lifetime would be a good instance of this.
2. The gift is to a superstitious use which has no charitable object (as to say masses for one's soul). **A superstitious use** is a gift to propagate a religion not tolerated by law, and the test as to whether the object is charitable may be obtained by ascertaining whether it falls within the category enumerated by 43 Eliz. c. 4, or can by analogy be included amongst them—and is totally void. The term charity in its widest sense denotes all good affections which men bear towards one another and in its most restricted relief of the poor. But the judges usually exercise their own discretion as to what is charitable and what is not so.

3. Although a legal estate cannot be limited to a charity, or the poor of a parish in perpetual succession as being an indeterminate body, yet Equity will see the intention carried out.
4. The defective execution of a power is remedied. (See p. 141.)
5. A conveyance though voluntary is not vitiated by a subsequent one for value under 27 Eliz. c. 4.
6. If the charitable purpose exhausts the whole pro-

[1] *Att.-Gen.* v. *Ironmongers' Company*, 2 Beav. 313, where a scheme *cy-près* was sanctioned, a bequest being to redeem British slaves in Barbary, and there were none.

ceeds of the land at the time of the settlement, but owing to a subsequent increase there is a surplus, such surplus shall be applied in the same manner and not result to the settlor's representatives, unless the settlor has indicated a contrary intention. (*Thetford School Ca.*, 8 *Rep.* 130 *b.*)

Lapse of time is no bar in equity between the trustee and *cestui que trust*, the former always being liable to account to the latter; [and formerly also anybody purchasing with notice[1] of the trust would have had to reconvey, however long he had held. (*Att.-Gen.* v. *Christ's Hospital*, 3 My. & Kee. 344.) But it has been decided that 3 & 4 Wm. IV. c. 27, s. 25 (the first statute which applied to equitable interests), places charitable trusts on the same footing with other express trusts in this respect. (*Magdalen College* v. *Att.-Gen.*, 6 H. L. Cas. 189.) Therefore a purchaser for value will now be safe within the period prescribed by the Limitation Act, 1874. (See *post*, pt. 2, c. 8.)]

Marshalling. But, on the other hand, equity will not marshal assets in their favour as it will in other cases. For if a general legacy is left to a charity without specifying the fund out of which it is to be paid, it will fail in the ratio which the whole bears to the prohibited portion. (*Williams* v. *Kershaw*, 1 Keen, 274 n.; *Robinson* v. *Gelding*, 3 M. & G. 745.) Thus if a legacy of 900*l.* is bequeathed to a charity, and charged on all the property, which consists of 6,000*l.* realty, 4,000*l.* mixed property (leaseholds suppose), and 2,000*l.* pure personalty, the charity is entitled to 150*l.*; for 10,000*l.* out of the 12,000*l.* consists of prohibited

[1] A purchaser without notice, having the legal estate, and equal equity with the *cestui que trust*, was always safe, on the principle that "where equities are equal the law prevails."

property, and this is five-sixths; therefore one-sixth only remains, and as the legacy ought to be equally distributed amongst the different funds, only 150*l.* will fall on the personalty; and if the testator had left debts, it probably would receive nothing, for pure personalty is primarily applied to pay them.

Marshalling may be defined to be an arrangement of different funds, so that all claims upon them may be satisfied and justice done to everybody. Frequently, and formerly more frequently than at present, one person may be able to come upon two or more funds and another only upon one; if the latter in that case is unable to get paid first he may find the only property to which he is able to have recourse already exhausted. Equity will then redress the rigour of the law, and allow him to take proportionally out of those from which the law excludes him.

Charity trustees, except by authority of Parliament or of the Chancery Division, or under a scheme legally established, or with the approval of the Charity Commissioners, are prohibited from selling charity land. (18 & 19 Vict. c. 124, s. 29.)

Corporations.—To enable them to purchase, licence from the Crown is still necessary, but licence from the lord is a thing of the past; if they purchase without this licence the land is still forfeited to the lord or the Crown; if they are of an eleemosynary nature, they will fail also under the provisions of the Mortmain Act. They convey by deed under their corporate seal, and if municipal they must obtain the consent of the Lords of the Treasury, or any two of them. Joint stock companies may hold land if registered under the Companies Act; but if not formed for the sake of pecuniary advantage they must have the sanction of the Board of Trade to be enabled to hold more than two acres. Also corporations and trustees holding money for public or charitable purposes may invest in any

Corporations. 7 & 8 Will. III. c. 37. 7 Edw. I. st. ii.

Municipal Corporation Act. 5 & 6 Will. IV. c. 76, s. 94.

25 & 26 Vict. c. 89.

of the authorized real securities without the Mortmain Act applying.

33 & 34 Vict. c. 34.

Aliens.

Aliens.—Since 33 Vict. c. 14, an alien ami may purchase and hold land. But an alien enemy is incapable of purchasing; therefore if he contracts for a purchase *flagrante bello*, the contract is void. But if it is made before war breaks out he can compel specific performance when it is over, because the remedy for contracts entered into during peace is merely suspended, and not destroyed, by a state of war.

Outlaws.

Outlaws—can neither take nor hold (33 & 34 Vict. c. 23). The Act for the abolition of forfeitures for treason and felony does not apply to them. The maxim is, "Let them be answerable to all, and none to them." But an outlaw can bring an action *en autre droit* as an executor, &c., because he then only represents other persons who are not under disability.

Attainted persons.

Attainted Persons, &c.—33 & 34 Vict. c. 23, enacts that their property shall not be forfeited to the Crown, and allows it to descend to their heirs.

Married women. Power of purchase.

Married Women.—The law as to married women in those cases which do not fall within the Married Women's Property Act, 1882 (for those cases to which the Act applies see *post*), is as follows. A *feme covert* can purchase without her husband's consent, and the conveyance is good till he avoids it. If he does not avoid it she may do so after his death; and this rule holds even if he consents to the purchase. Further, her heirs may waive it after her death if she dies before him, or if in her widowhood she has not ratified it. She may also be made a trustee, as she has sufficient natural discretion; but it would not be advisable to select her, because she can only deal with the legal estate with her husband's consent, and by observing the tedious and expensive formalities about to be described, and which are necessary for her disposition.

Power of aliena-tion.
1. By deed

By Deed.—Before the Fines and Recoveries Abolition Act the only way in which a married woman could convey her real estate was by a fine duly levied by her husband and herself in the Common Pleas, she being separately examined to ascertain whether she did it of her own free will, and not by compulsion or cajolery, or as it was expressed in those days, to prevent her being either "kissed or kicked out of it." Since the Act every kind of interest in real property may be conveyed by her by deed executed with her husband's consent, and acknowledged to be her own act and deed before a judge of one of the common law divisions (or any county court) (19 & 20 Vict. c. 108, s. 77), or a Master in Chancery, or formerly two commissioners. Now, by the Conv. Act, 1882, s. 7, one commissioner is sufficient. The separate examination as to her consent continues. If her estate is an estate tail it must be conveyed in the same manner as other estates tail, with the acknowledgment in addition. (3 & 4 Will. IV. c. 74, ss. 77, 79, 80.) The Act also enables her to release any powers, and (by 8 & 9 Vict. c. 106, s. 7) she may disclaim any interest by going through its formalities.

She may execute powers by deed or will without the consent of her husband, and if she pleases in his favour.

She may dispose of separate property, unless restrained by the clause against anticipation, without his consent by will or ordinary deed without the formalities required by the Act. (*Taylor* v. *Meads*, 34 L. J. Ch. 203.) (See *post*, p. 147.)

She and her husband by going through the formalities prescribed by the Fines and Recoveries Act may dispose of her reversionary interests in personalty, and she may also release her equity to a settlement, unless she has been forbidden by the instrument giving it, or unless it is property settled on marriage. (Malins' Act, 20 & 21 Vict. c. 57.)

She may, whether an infant or not, appoint an attorney

by deed to execute anything which she may herself execute. (Conveyancing Act, 1881, s. 40.)

2. By will. **By Will.**—She cannot leave realty by will unless it is settled to her separate use, and the Wills Act (s. 8) makes no difference in the testamentary capacity of a feme covert. In order to be able to devise land she should have a trust or power conferred on her for that purpose. It may be exercised without her husband's consent, and in his favour or that of anyone she pleases. In *Noble* v. *Willock* a woman had property, and in her marriage settlement a power of appointment was given her if dying in her husband's lifetime; she made a will with his assent and survived him. It was held that the will did not pass the appointed property, and that his death operated as a revocation of his consent. (8 Ch. App. 788; 7 H. L. 580.)

Interest of husband in the wife's land. Her husband takes the rents and profits of her realty while the coverture continues (except under 33 & 34 Vict. c. 93, s. 8, see p. 148), and is also entitled to an estate by the curtesy at her death, if there is issue born alive and the estate is one of inheritance, of which she is actually seised in possession[1] and which the issue could inherit. He can dispose of her leaseholds *inter vivos*, but not by will, provided they can by any possibility come into possession during the coverture (*Duberley* v. *Day*, 6 Beav. 33); but if the leaseholds are equitable, she is entitled to her equity to a settlement. **Separate estate.** Equity, however, has for a long time past permitted her to have property settled to her separate use, and in regard to this she stands precisely on the same footing as a feme sole, and can dispose of the property to her husband or anyone by an ordinary assurance or by will. (See *Eager* v. *Furnevall*, p. 32.) It is usually given to trustees, but if there are none equity will

Hulme v. Tenant, 1 W. & T.

[1] The fact of its being preceded by an estate for years does not make any difference, even if she dies before the term determines.

make the husband a trustee for her, for a trust never fails for want of a trustee.[1] Cas. p. 521.

Sometimes, fearing her husband's influence, the settlor has put in a clause against anticipation, which means that she cannot dispose of the property during coverture,[2] but only take the interest when due; and it was decided in *Robinson* v. *Wheelwright*, 21 Beav. 214, that the Court had no power to allow her to dispense with the restraint. This decision is now reversed by s. 39, Conveyancing Act, 1881, which allows the Court, if it appear to be for her benefit, by judgment or order, with her consent, being *sui juris*, to bind her interest. Also by the Settled Estates Act, 1877, s. 50, no clause shall prevent the Court from exercising the powers of that Act. Also the clause has been rejected when its effect would have violated the rule against perpetuities. (*Re Ridley*, 11 Ch. D. 645.) On the death of her husband—the reason of the restraint against anticipation disappearing—the restraint itself also disappears; then, indeed, separate estate itself, and the restraint, its adjunct, are both entirely gone: if it were not so the rule which rendered freedom of alienation an inseparable incident to a gift would be utterly broken, and the Court only desires to deviate from it so far as to exclude the marital influence; on a subsequent marriage, however, they re-attach, that is if she has not entirely changed the nature of the property in the interim.

Clause against anticipation.

Tullett v. Armstrong, 1 Beav. 22.

If there is property belonging to the wife which the

Equity to a settlement.

[1] In this case, however, the conveyance of the legal estate requires a deed acknowledged, &c., in pursuance of 3 & 4 Will. IV. c. 74.

[2] It was laid down in *Pike* v. *Fitzgibbon* (L. R. 17 Ch. D. 454), that she cannot bind property which she is restrained from anticipating by contract, not even though the restraint falls off before payment; and also that separate property which she acquired after entering the contract was not bound, the presumption being that by a general engagement she merely charged such separate estate as she had. This latter part of this decision is now reversed by the Married Women's Property Act, 1882, ss. 3, 4.

husband can only obtain through the medium of the Chancery Division, the Court will make its own terms with the husband before handing it over to him; and these terms will be to compel him to make a settlement on the wife. The amount he will have to settle will depend upon circumstances; the Court exercises its discretion and will take into consideration whether she is already provided for and what the amount of the property is.

33 & 34 Vict. c. 93.

There is also statutory separate property which has been created by the Married Women's Property Act of 1870, now repealed by the Act of 1882. Section 8 of this Act related to realty, and provided that the rents and profits of any freehold, copyhold, or customary property, which she took by descent should be separate estate; it applied only to women married after the passing of the Act (9th August, 1870).

Married Women's Property Act.

The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), taking effect from 1 Jan. 1883, has placed married women on an entirely new footing in regard to property.

Its provisions relating to real property are as follows:—

1.—(1) A married woman shall **acquire, hold and dispose by will or otherwise** realty or personalty like a feme sole without the intervention of any trustee.

This section, it may be observed, does not interfere with the law of intestate succession, therefore, subject to the wife's testamentary disposition, the husband's curtesy still remains.

(2) A married woman shall be capable of contracting to the extent of her separate property, and of suing and being sued, either in contract or tort, and her husband need not be joined, and costs recovered by her shall be separate estate, and those recovered against her shall be payable out of it.

(3) Her contracts shall be considered to be made with respect to her separate estate, unless the contrary is shown; and

(4) Shall bind all future separate property.

(5) If carrying on trade apart from her husband, she shall be subject to the bankruptcy laws.

2. Woman married after the Act shall be entitled to have and to hold and to dispose of as separate property all realty and personalty belonging to her at the time of the marriage, and acquired or devolving since, including acquisitions in any separate employment.

4. The execution of a **general testamentary power of appointment** shall make the property appointed liable for her debts.

Formerly a married woman stood in a different position to a man in this respect. Although she could always exercise a power, yet a defective execution was not remedied in favour of her creditors. (See *post*, p. 170.)

5. Every woman married before the commencement of the Act shall be entitled to have, hold and dispose of as separate property, all realty and personalty, her title to which, whether vested or contingent, and whether in possession, reversion or remainder, shall accrue after the commencement of the Act.

It has been decided in *Baynton* v. *Collins* (W. N. 1884, p. 171), that this section applies to property where the title in reversion accrues before 1 Jan. 1883, but the title in possession accrues after that date.

19. The Act does not interfere with ante-nuptial or post-nuptial settlements or agreements for them respecting married women's property, nor interfere with restrictions against anticipation, excepting that any such restriction in a settlement or agreement for one of a woman's own property by herself, shall not have any validity against ante-nuptial debts, nor any greater force against her creditors than a like settlement by a man would have against his creditors.

Therefore the clause against anticipation can still be used, a settlement on a woman still differing from one on a man in this respect, but its machinery cannot be dealt

with by a woman in such a manner as to defraud her creditors.

22. The Married Women's Property Acts, 1870 and 1874, are repealed, but acts done by and rights acquired under them remain unaffected.

Therefore, to sum up—A woman married before 1 Jan. 1883, as to property **falling into possession** after that date, and a woman married after that date, as to all property, has, subject to contrary settlement, the same power over her property, and remedies and liabilities in regard thereto, as a man, the sole exception being the possible existence of a restraint against anticipation; and she has also full power to contract in relation to such property. This, of course, works a change of the most radical importance in relation to the disability of married women, and renders nugatory the former law, except in cases which do not fall within the Act, and which will gradually become fewer and fewer.

Infants.

Infants may take land, but their purchases are voidable, and also their conveyances, except—

1. When made under a custom, as in gavelkind tenure, where the infant may convey by feoffment at fifteen.
2. In marriage settlements, as permitted by 18 & 19 Vict. c. 43. (See *post*, Pt. II. c. 5.)
3. Under the direction of the Chancery Division which can now authorize leases and sales of an infant's fee simple land and leaseholds, as s. 41, Conveyancing Act, 1881, provides that they shall be deemed settled estates within the Settled Estates Act, 1877. [Before this the Court could only sell an infant's land under statutory powers given by the Partition Acts, under 1 Will. IV. c. 47 (to pay debts), and some others, and not on the mere ground that a sale would be beneficial. (*Calvert* v. *Godfrey*, 6 Beav. 97.)]

Their purchases are always voidable.

Idiots and Lunatics may take land. Their purchases are voidable, while their conveyances are absolutely void since 8 & 9 Vict. c. 106, s. 4, which requires feoffments to have no tortious operation. [Before this time, if made with livery of seisin, they were said to be voidable merely because the seisin vested in the purchaser until it was taken from him.] **Idiots and Lunatics.**

Bankrupts.—If the bankrupt has contracted to sell, the trustee must carry it out on terms of being paid if the purchaser was without notice of the bankruptcy, and the purchase was made before the date of adjudication. If the bankrupt is the purchaser it will be binding on the vendor, but may be disclaimed by the trustee. The vendor can, however, protect himself under his lien for the purchase-money. **Bankrupts.**

CHAPTER II.

MODES OF ALIENATING.

Kinds.

VOLUNTARY alienation may be by conveyance *inter vivos*, or by testament. Alienation *inter vivos* may be effected (I.) by matter *in pais*, or deed by conveyance which may operate (α) at common law; (β) by virtue of the Statute of Uses; (II.) by matter of record; (III.) by special custom as in copyholds.

1. At Common Law. Primary. Feoffment.

I. Conveyance inter vivos.—The old common law conveyances are either primary or derivative.

1. **Feoffment**—*i. e.*, feoffment with livery of seisin, which means delivery of the feudal possession. (Livery was the essential part of the conveyance, the feoffment being merely the words of donation which accompanied it and which were necessary to mark out the quantity of the estate which the feoffee was to take. The seisin was the feudal possession, and therefore the person seised must be a freeholder. Great importance has been attached to this seisin by the law, which always must be in the possession of some one; and therefore if at any given period, by the death or otherwise of the particular tenant, the estate is without an owner, and the remainderman, owing to any cause, is at present unable to take up the seisin, the estate will pass to the next person entitled and the remainderman in question will lose it for ever.

Livery was—

(1.) **In deed.**—This was performed on the land by the parties themselves, or by attorney. All concerned must

consent or absent themselves. The feoffor gave the feoffee a twig, or turf, or something from the land, as emblematic of the whole, and then went through certain formal words. Scattered lands in one county could be thus conveyed by a single feoffment, but not so lands in different counties. These, however, could be conveyed by a single livery.

(2.) **In law**—which could not be done by deputy, but might be made in sight of the land. It passed lands in different counties. It differed from livery in deed in that the husband had no curtesy, and there could be no trespass before the tenant had entered.

2. **Grant.**—This was once appropriate solely for the creation and transfer of incorporeal hereditaments, or of reversions and remainders in corporeal hereditaments which were expectant on the determination of a previous freehold. In the conveyance of a reversion it was necessary that the tenants should **attorn** to the feoffee, which means give their consent to the change of lordship; but this could be evaded by levying a fine in the common pleas, and was finally abolished by 4 & 5 Anne, c. 16, s. 9. A reversion expectant on a term for years could be conveyed indifferently by feoffment or grant. **Grant.**

3. **Lease** or demise is a conveyance by which a man grants lands or tenements to another for life, or for years, or at will. The interest granted must be less than that of the donor, for if not it is an assignment. **Lease.**

4. **Exchange.**—This is a mutual grant of equal interests, the one being in consideration of the other. The estates exchanged must be of equal quantity. The value is totally immaterial, as is the quality, for an estate in joint tenancy may be exchanged for one in severalty, or an estate in possession for one in expectancy. The operative word in the conveyance is "exchange"—one of the very few **Exchange.**

instances in which a particular word is necessary to effect its purpose. Livery was never necessary to complete this conveyance, each party standing in the place of the other, but the conveyance was not complete until entry.

[(Before 8 & 9 Vict. c. 106, s. 4, as exchanges implied a warranty, if either party was evicted he could recover his own lands again (see *post*, p. 189) from the other or his alienee).] Where difficult to carry into effect an exchange privately, it may be effected by the Inclosure Commissioners on application in writing, and their order effects the exchange without conveyance, and the lands taken in exchange are subject to the same uses as those given in exchange (8 & 9 Vict. c. 118, s. 147).

Partition. 5. **Partition**—whereby all tenants holding promiscuously can sever their estates. Coparceners originally could have made it by parol, accompanied with livery, but for joint tenants and those in common (unless copyholders) a deed was necessary.

Derivative. **Derivative conveyances** are those in which the grantee already has some estate, and which enlarge, alter, or transfer it. They consist of a—

Release. 6. **Release**, as—

(1.) Where a remainderman releases his right to the particular tenant; or

(2.) Where one coparcener releases his or her right to the other; or

(3.) Where my tenant for life leases to A for life and gives the remainder to B and his heirs, and I release to A. Here the estates of A and B will become certain. They were uncertain before, and such gifts were not in the power of a tenant for life to make.

7. **Confirmation**, which is akin to a release, as where the reversioner confirms a lease made by a tenant for life, which extends beyond his interest. **Confirmation.**

8. **Surrender**, which is exactly opposite to a release, and occurs where the particular tenant surrenders his interest to the remainderman or reversioner. **Surrender.**

9. **Assignment**, which is a transfer of a man's whole interest in leaseholds to another; and lastly, a **Assignment.**

10. **Defeasance**, now obsolete, a collateral deed made at the same time with another conveyance containing conditions, upon the performance of which the other estate will be defeated. The conveyance and conditions at the present day are put in the same deed. **Defeasance.**

Formalities.—At the common law (1) a Grant, Confirmation (unless implied, Co. Litt. 295b.), Defeasance, Release, Partition (unless by copyholders, termors or coparceners), must always have been by deed; [while (2) a Feoffment, Partition[1] (not being of copyholds), by termors or coparceners, Exchange[1] (not being of copyholds), Lease (except one for three years or less, and at a rent of not less than two-thirds the improved value), Surrender (unless of a copyhold,[2] or one by operation of law (*Roe* v. *Archbishop of York*, 6 East, 86)), and Assignment of chattels (not being copyhold) could originally have been verbal. Writing was first required for the creation of such interests by the Statute of Frauds, s. 1, otherwise they would create merely an estate at will; and writing was rendered necessary for transfers of them by s. 3—such writing to be signed by the party creating or assigning, or his agent appointed **Formalities.** **29 Car. II. c. 3.**

[1] For copyholds there would be mutual surrenders and admittances according to the custom of the manor.

[2] In copyholds surrenders are regulated by particular custom.

8 & 9 Vict. c. 106, s. 3. in writing.] Finally, the Real Property Amendment Act enacted that these conveyances should be void unless made by deed, a feoffment under a custom (*e. g.*, gavelkind), by an infant, being expressly excepted, in which case the writing and signature required by the Statute of Frauds are alone essential.

Conveyances under the Statute of Uses.

Uses. **Uses,** their origin.—At the common law, when land was given to A and his heirs, A was considered absolute owner. But equity took a different view, and unless

1. There was some consideration for the grant, however small; or
2. It was specified that it was for the use of the donee or of some other person,

it would consider that the donee held it for the benefit of the donor, and it would be called a **resulting use.** The idea of uses was introduced by the ecclesiastics to enable them to evade the Statutes of Mortmain; but owing to their convenience, they became in course of time to be applied to nearly all the lands in the kingdom. The donor would give the lands to A and his heirs to hold them for the use of some person who he wished to have the real enjoyment of them, and who was considered the donee by equity. The position of this person he wished to make as favourable as possible, and could do so by means of uses.

Their advantages were as follows:—

1. The estate of the cestui que use, as the equitable owner was called, was not liable to **forfeiture** (not even for treason until the reign of Henry VIII.);

   or **escheat**;

   or dower or curtesy;

   or any legal process for debt or otherwise.
2. The strict common law rules not applying to uses, they could be assigned by secret deeds;

3. And informal future interests could be created;
4. And land could thus indirectly be devised by will.

According to Blackstone, they became very common during the wars of the Roses, men thus securing their estates from forfeiture. Lord Bacon complains that by means of them, creditors, husbands, wives, and lords were often defrauded of their just rights, not knowing against whom to bring their actions, apparent possession of the land being no proof of beneficial ownership.

They arose—

How arising.

1. **Expressly**—as where A "grants Dale to B and his heirs to the use of C and his heirs."
2. **Impliedly**—as where A "grants Dale to B and his heirs." Here the use results to himself. Or where A "covenants to stand seised of Dale to the use of B and his heirs," a son, wife, or near relative; or "bargains and sells to B and his heirs." These two last were mere contracts, but owing to the pecuniary consideration in the one case, and the natural affection in the other, equity would enforce them. B in the first and A himself in the last two cases mentioned, were the legal owners, and their estates had all the common law attributes, yet equity would not allow them to derive the slightest material benefit. Until the time of Henry VI. it only interfered with the feoffee to uses himself, but afterwards it gave relief against anyone claiming from him except a purchaser for value without notice of the use.

27 Hen. VIII. c.10.

Several statutes were passed to curtail the privileges enjoyed by the cestui que use, and finally the **Statute of Uses**, "for transferring uses into possession," gave him the legal estate, and made the feoffee to uses merely a conduit pipe. By this statute the legislature hoped to do away

with all the innovations and injustice uses had introduced, and restore conveyancing to the state in which it existed in the time of Edward III. This object was a failure, for by means of equity the statute was evaded soon after it came into force; nevertheless, it produced vital changes in the landed system of the country, for estates were brought under legal recognition, which formerly were known only to equity, and new limitations and methods of alienation were allowed. The effect produced by the statute was "that a feoffment of Dale to A and his heirs, to the use of B and his heirs," will give B the legal as well as the equitable estate, and that a feoffment to A and his heirs and nothing more will merely revest the legal estate in the feoffer.

But it has been decided that the Statute of Uses can be eluded and has no application

Use upon a use. Tyrrell's case, Tud. Cas. Pry. 274.

1. If the feoffment or other conveyance is to A and his heirs, to the use of B and his heirs, to the use of C and his heirs, or unto and to the use of B and his heirs to the use of C and his heirs, for it was held that B and not C got the legal estate under these limitations; or in other words, "that the statute would only execute the first use, and does not apply to any subsequent ones." But equity, consulting the wishes of the donor, would compel B to hold it for the benefit of C. Therefore the whole effect of the famous Statute of Uses, is to make it necessary to add the words "to the use of" at the end of every conveyance, and the result will be precisely as it was before the Act was passed.

Suppose in the case specified the words to the use of D and his heirs, in trust for E and his heirs, upon confidence for F and his heirs, were appended, F, the last-mentioned person, will get the equitable estate and B the legal one.

"Use" is the word generally used, but any others of like meaning will do, as equity looks only to the intention.

Active duty for feoffee to uses.

2. If in the above example A had an active duty to perform, as to collect the rents and profits and hand them over

to C, it is considered necessary for him to retain the legal estate in order to get them.

3. If the estate is less or other than a freehold, as a term for years or a copyhold, the word "seised" in the statute makes it only applicable to freeholds. Therefore if the limitation above was to A for ten years for the use of B, A would remain legal owner. But the statute did apply if the person seised had a freehold, although the estate for which he was seized for the use of the other was of a chattel nature. Thus, if the above limitation was to A and his heirs, to the use of B for ten years, or if A, tenant in fee, covenanted to stand of Dale for B for ten years, B became the legal owner for the term. The law was similar if he bargained and sold the terms. **Terms.**

4. The doctrine of resulting uses extends only to those cases in which a fee simple passes, and not when a lesser estate is given. (1 Cruise, T. 11, c. 4, s. 50.) **Resulting uses restricted.**

Although testamentary gifts of realty were legalized only after the passing of the statute, yet uses limited by will are executed, if there is no index of a contrary intention, the test as to who shall take the legal estate depending on whether there is any trust attaching to the first donee, not on the words used. **Applies to wills.**

Before the statute there were certain persons who could not be seised to a use. For instance, a corporation could not be seised to any use but its own, for as it had no soul, equity could not act upon its conscience; neither could the king or queen on account of their royal dignity, nor aliens or attainted persons who were unable to hold land at all. These persons who were disabled from being feoffees to uses before the Act consequently could not become conduit pipes after; but at the present day almost anybody (excepting the Bank of England) may be a trustee; nevertheless several, such as bankrupts, infants, married women, &c., it would be injudicious to select, and others, such as the Sovereign, it would be difficult to force to perform the trust. **No use owing to the disability of the person.**

No use owing to the disability of the thing.

There were several classes of property which from their nature could not be made the subjects of a use, as in the case of things of which the use was inseparable from the possession, and those *quæ ipso usu consumuntur*, as ways and commons, though of many incorporeal hereditaments, such as rent and advowsons, a use was allowed.

By the Conveyancing Act, 1881, s. 62, any easement, right, liberty, or privilege may be granted by way of use. This is convenient; for formerly if one wished to give Dale to A, and to give B a right of way over it, two deeds were necessary, whereas one deed alone is necessary now.

Effects of the statute.

The statute only executes the use so far as there is a corresponding seisin: *e. g.*, if Dale be conveyed to A for life to the use of B in fee, B will only have an estate for the life of A.

The device of grafting a use upon a use has given rise to modern trusts. In the example given (p. 158) it was evident that B was not intended to keep the estate, and equity considered the intention everything, and made him a trustee for C; but generally the modern trustee is different from the ancient feoffee to uses; *e. g.*, originally any consideration given by the donee would rebut the presumption that it (the conveyance) was not for his benefit; but now all circumstances are of importance, and sometimes, as when a purchase is taken in the name of a son (*Dyer* v. *Dyer*, 1 W. & T. Cas. 223), the courts will presume the person in whose name the conveyance is made is intended to hold, although he had paid nothing. There is no difference indeed in the principles; but in the exercise of them the modern courts of equity have avoided those mischiefs which made uses intolerable.

The statute has introduced new ways of alienating land, which take their names from it. These conveyances have not abolished the common law ones, though they have practically superseded them. If the conveyance is

for value—for instance, a mortgage—there is no necessity to use the words "to the use of," though it is always done.

II. Statutory Conveyances.

The statutory conveyances are five in number:—

1. Feoffment to uses.

1. A feoffment to uses—merely the ordinary feoffment with the use annexed to it; *e. g.*, grant to A to the use of B, or grant to B to the use of B, or grant unto and to the use of B. B is the legal and equitable owner in each case.

2. Covenant to stand seised. **3. Bargain and sale.**

2. A covenant to stand seised.

3. A bargain and sale.

These two last before the statute were merely contracts. The statute made them conveyances, and transferred the legal estate from the bargainor or covenantor to the bargainee or covenantee. These were the only two conveyances which operated without transmutation of possession.

By a bargain and sale the freehold in possession, or a reversion or remainder, might be transferred in the one case without livery, and in the other without attornment. Therefore the publicity of transfer and ownership aimed at by the Statute of Uses was likely to be defeated, and in consequence the **Statute of Enrolments** was passed, enacting that every bargain and sale should be by deed indented and enrolled in six months. A loophole was soon discovered in this statute; it only applied to freeholds, and the lawyers of the day hit upon another expedient to convey a fee simple secretly—that is, without livery, entry, or enrolment. A common law lease, followed by a release, required entry, but— 27 Hen. VIII. c. 16.

4. Lease and Release.

4. A bargain and sale for a year or a term of years, followed by a release, did not, and it vested a legal estate in the bargainee, owing to the Statute of Uses (see p. 159); hence it was a sufficient interest in possession to ground a release upon; for a release was inoperative to transfer any future interest, unless that interest was

supported by a prior legal estate—as it was in fact the giving up of the reversion or remainder to the prior particular tenant, and that became the mode of transferring landed estates in possession. It was called a **Lease and Release**, and was partly a statutory and partly a common law conveyance. The pecuniary consideration might be merely nominal, or, indeed, need not be paid at all. In 1841 even the necessity of two deeds was done away with, for an Act was passed rendering a release alone as effectual as a lease and release formerly was. In a few years' time a release was superseded by—

4 & 5 Vict. c. 21.

5. Grant to Uses.

5. **A Grant to Uses.**—For 8 & 9 Vict. c. 106, s. 2, enacted that corporeal hereditaments in possession "shall lie in grant as well as in livery," from which time every description of interest in real property could be conveyed by a simple deed. "Grant" is the proper and technical word to be employed in a deed of grant. (Shep. Touch. 229.) But the Conveyancing Act, 1881, s. 49, allows other words, such as "convey," to be used instead.

Advantages of statutory conveyances.

These conveyances, when made legal, brought with them, and in some cases still retain, many attributes which they possessed when merely equitable interests, the principal of which are as follows:—

1. That a man may convey to himself or his wife. Therefore if A and B are joint tenants, and they desire to convey to A and C, the conveyance may be made "to X to the use of A and C." (Formerly separate conveyances were necessary, and for this reason joint tenants being reckoned as one person, the conveyance was practically one by A to himself, and there had consequently to be an intermediate conveyance to a third person. The same objection lay to a direct conveyance by a man to his wife, husband and wife being one—though the law allowed the husband to devise to his wife.) But even conveyance by way of use is not now required. For by the Conveyancing Act, 1881, s. 50, freehold land, or a thing in action, may be conveyed by a person to himself jointly

with another, or by a husband to his wife, or *vice versâ*, directly, without the machinery of the statute. Since the Inheritance Act a man conveying to himself becomes in every case a purchaser by virtue of the assurance; previously to that time, if the remainder was to himself in fee, he was not considered a purchasing ancestor, but was in of his old title. 3 & 4 Will. IV. c. 106.

2. A freehold can be created at a future time, and a fee limited on a fee. Thus, land may be given to A, with a proviso that if at any time he shall cease to use certain arms, or become bankrupt, or marry, then it shall go over to B. A man cannot, however, make a disposition over on bankruptcy of his own property in trust (*Phipps* v. *Lord Innismore*, 4 Russ. 131; *Brandon* v. *Robinson*, 18 Ves. 429) for himself, but he may of his wife's on marriage. He may settle his own property, so as to make it determine on his own attempted alienation for value. (*Knight* v. *Brown*, 7 Jur. N. S. 894.)

Executory interests.

These limitations are called executory interests, and if by deed are of two kinds :—

Springing use.

(1.) If an estate is conveyed to A and his heirs to the use of B and his heirs on marriage, the estate of B is called a **springing use.** Until B marries the use results for the benefit of the grantor; but when that event takes place, B's estate springs into existence. Such a limitation was never allowed at the common law, it being necessary that the seisin should vest at once.

Shifting use.

(2.) If an estate is conveyed to A and his heirs to the use of B and his heirs, but when C returns from Rome to the use of D and his heirs, when the event occurs B's estate is divested, and goes over to D. This is called a **shifting use.** Early lawyers were puzzled on the happening of the event, as to who was seised to the use of D. The seisin of A, they argued, was co-extensive

only with the use of B; however, they got over the difficulty by maintaining that there was a possibility of seisin, or **scintilla juris**, still in A, which spark was kindled into a flame on the happening of the event. Lord St. Leonards maintained a contrary opinion, viz., that the uses took effect as legal estates according to their limitations, because of the seisin originally vested in A; and 23 & 24 Vict. c. 38, s. 7, makes this view law.

Executory interests differ from contingent remainders in that while a contingent remainder was itself liable to be destroyed prematurely, and may still fail, they, on the other hand, will themselves destroy the particular estate. Again, they do not require the protection of the particular estate as a remainder does. But the law favouring remainders, which were known to it before uses were engrafted into it, will never construe a limitation as executory if it can be interpreted as a remainder, that is provided the estate is a legal and not an equitable one. For in a recent case where property was devised to trustees in trust for A for life, remainder to such son of B as should first attain twenty-five, it was held that the gift to B's son was void as transgressing the perpetuity rule, the limitation to the trustees preventing it from being construed as a remainder. Could it have been so construed it would have been valid, as it did not break the common law rule as to remoteness, and B had a son twenty-five when A died. (*Re Finch*, *Abbiss* v. *Burney*, 50 L. J. Ch. 348.)

Executory interests could formerly have been barred by a fine, and now may be disposed of by deed by 8 & 9 Vict. c. 106, s. 6. They can also be created by will, in which case they are called **executory devises.**

Powers. 3. The grantor can reserve to himself or give to another power to alter or revoke the grant. This was utterly unknown at the common law, and is an engine of marvellous efficiency. By these means a use and the estate which

accompanies it will spring up at the will of the person who has the power; thus:—Dale is given to A and his heirs to such uses as B shall appoint, and until and in default of appointment to C and his heirs. The power which B has is a mere authority and not an estate. It differs from a trust in that— **Differ from trusts.**

1. It is wholly or partially discretionary, while a trust must be to some extent imperative. Usually trustees must do certain acts, but there is a discretion given to them as to how they are to be done. Thus, if A devises Dale on certain trusts and gives the trustees a power of sale and exchange, they need not sell unless they please; but if they do, they are obliged to hold them upon the trusts of the old ones.

2. In a power there are three persons to consider; the donor of it, the donee, and the appointee; the appointee taking the estate from the donor, for the appointor has no estate to give. In a trust there are two, the trustee and the cestui que trust; and the trustee retains the legal estate.

There are also **powers in the nature of trusts**; as if A gives property to his children in such shares as X shall appoint. Suppose X makes no appointment, and there is no provision in default of it, the children shall take equally. (*Harding* v. *Glynn*, 2 W. & T. Cas.) For it is considered that the donee being a sort of trustee should exercise the power in some way, and if he does not the Court will do it for him.

Powers are general or special—

1. **A general power** is when the appointor may appoint to anybody he pleases, as if A gives B a power of appointment over Dale, and until and in default of appointment to X in fee. In such a case, B, by exercising the power, will divest X's estate, and the appointee will take from A and not from B, for B had no estate. **Kinds.**

2. **A special power** is when the donor names an object or class of objects, in which cases the appointor can only

appoint to them. In a special power the appointee's estate vests from the creation, and not from the execution of the power: in a general power the law is just the other way. Therefore, in the former case, no estate can be created which would not have been valid, if limited by the instrument creating the power, though the parties in both cases take their estate from the donor of the power, and not from the appointor. This is important in regard to transgressing the rule against perpetuities. When a general power is given the property is not tied up until the appointment is made, therefore it need not vest till within the time prescribed by the rule, dating from then—but under a special power, the property is tied up from the giving of the power, and must not break the time allotted by the rule, dating from the settlement or will. Thus, suppose Dale is settled to such uses as A. shall by will appoint, and Blackacre to such of his children as he shall by will appoint, and he appoints both to such of his children as shall attain twenty-three. The first appointment is good, and the second bad.

Powers are also appendant, collateral, and in gross. (*Edwards* v. *Slater*, Tudor Cas. Pry., p. 305.)

1. **Appendant.**—Where it must be exercised during the continuance of the estate which is limited to the donee of the power, and therefore wholly or partially overreaches that estate; as when a tenant for life is empowered to make leases. If such a tenant has mortgaged or leased his estate, he cannot exercise the power to the prejudice of his incumbrance; but he can as regards any portion to which that incumbrance will not extend. In such a case the power is said to be suspended; but if he parts with his whole interest, it is entirely extinguished (1 Sug. Pow. 57, &c., 8th ed.); unless it was originally authorized to be executed by him and his assigns, in that case it will pass to any person who has the estate. (1 Sug. Pow. 180, 8th ed.)

2. **In gross.**—This is when the power is to be exercised after the determination of the estate of the donee of the power as a power of jointuring inserted in marriage settlements. (Burt. Comp. pl. 180.) The parting with his own interest does not extinguish this (though a tortious conveyance formerly did so) unless it is only to be exercised during the continuance of his interest.

3. **Collateral.**—Where a power is given to a mere stranger who has no interest in the lands. (*Digg's case, sub Edwards* v. *Slater*, Tud. Cas. Pry., p. 314.) By the Conveyancing Act, 1881, s. 52, there can be a contract not to exercise it, or it can be released[1] (which formerly it could not be) like a power appendant or in gross (which is done by a release to the person having the interest defeasible by it), thus permitting the total extinction of powers. By s. 38, the exercise of powers by the surviving executors or trustees is permitted. By the Conveyancing Act, 1882, s. 6, any person to whom a power, whether coupled with an interest or not, is given, may by deed disclaim it, and on such disclaimer the power may be executed by the other donees, unless the instrument creating the power expresses the contrary. But where the power is not only vested in the trustees, but is of a nature to imply a personal confidence in the particular individuals, it can neither be released nor disclaimed. (*Re Eyre*, W. N., 1883, p. 153; 49 L. T. 259.) A power collateral is of a purely personal nature, and cannot terminate by bankruptcy or any other disability.

Defective execution of a power.—The law is very particular that the power should be executed as the instrument creating it requires. If a certain number of witnesses are specified, a smaller number will not do; the directions of the donor must be complied with to the letter. But **Defective execution.**

[1] Unless, being coupled with a duty, the release would be a breach of trust (*Walter* v. *Ker*, L. R. 1 Sc. App. 11, 14).

22 & 23 Vict. c. 35, s. 12. Lord St. Leonards' Act provides that a deed executed in the presence of two witnesses shall be sufficient in spite of any additional solemnity being required. But if there is a direction that the consent of some person is necessary, that consent must still be obtained, and if the donee should prefer, he may still exercise it as the donor required. Therefore, if the donor says ten witnesses are necessary, there may be ten, but there must be two; if he says one witness, one will do; if he says writing not under seal is sufficient, writing will do.

7 Will. IV. & 1 Vict. c. 26, s. 10. If the power is to be exercised by will, the Wills Act makes the presence of two witnesses obligatory, although the donor may have said that a lesser number shall be sufficient; but two are always to be sufficient, even if he may have said that it shall not be exercised without more.

Tollett v. Tollett, 1 W. & T. Cas. p. 254. Equity aids the defective execution of a power if—

1. The defect is not material. Thus, if the donee is told to do it by will and he does it by deed, it will not interfere; for the defect touches the essence of the power, inasmuch as he makes use of an irrevocable instrument when desired to use a revocable one. But if he does it by will when told to do it by deed, equity will uphold the execution; and

2. Further provided the execution is in favour of—

   1. A purchaser, or mortgagee, or lessee.
   2. A creditor.
   3. Charity.
   4. Wife or child, if legitimate. But a defective appointment by a married woman will not be aided for the benefit of her husband, though it will be in favour of the parties above mentioned. (*Watt* v. *Watt*, 3 Vesey, 244; *Pollard* v. *Grenvil*, 1 Ch. Ca. 10.)

Non-execution of a power is not relieved against by equity. **Non-execution.**

Exceptions—

1. If the execution has been prevented by fraud;
2. If the power is coupled with a trust, as mentioned, *supra*, p. 165.

Powers collateral are generally in the nature of trusts.

Therefore, if A has a general power and does not exercise it, and dies in debt, the property will continue in the person entitled in default of appointment; but if he had exercised it in favour of volunteers, it would have been taken from them to pay his debts. (*Thompson* v. *Towne*, 2 Vern. 319.) For it was in his power to have applied it in satisfaction of their demands by appointing to them or to himself, and his not doing so is a defective execution remediable as above stated.

On bankruptcy the trustee can exercise any power to the same extent as the bankrupt could have exercised it for his own benefit.

Excessive execution of a power is generally bad as to the excess where the execution is complete, and the bounds between it and the excess clear. An appointment to children, for instance, will not include grandchildren, and can only be upheld as being, first, an appointment to a child, and then an assignment to his issue. (*Routledge* v. *Dorril*, 2 Ves. jun. 357.) If a man leases for longer than the power permits, by 13 & 14 Vict. c. 17, it is good against him; and if his estate determines, the lessee is bound to accept a confirmation at the instance of the next tenant. **Excessive execution.** Alexander *v.* Alexander, Tud. Cas. Pry. 230.

Powers may be released by deed (and in the case of a married woman, not falling under the Married Women's Property Act, 1882 (see p. 148), the provisions of the Fines and Recoveries Act must be adhered to).

Powers, as previously remarked, are of great convenience. Dower could have been effectually barred by means of them. A married woman can exercise them without the consent **Advantages.**

Powers of married women. of her husband, and if she pleases she can appoint to him. Formerly, her creditors could not seize the property over which she had a general power, unless there was any fraud on her part. (*Vaughan* v. *Vanderstigen*, 2 Drew. 165.) But a recent decision varied the law on this point. A had personal estate settled to her separate use with remainder, as she should by deed or will appoint. There was no clause against anticipation. At the request of her bankers, she gave them a letter, charging her interest (which was comprised in the settlement) in a fund standing to her credit as administrator of her husband, as security for overdraughts in her private account. She made her will executing the power and died indebted. It was held that the appointed property was liable. (*London Chartered Bank of Australia* v. *Lempriére*, 4 L. R. P. C. C. 572.) Now by the Married Women's Property Act, 1882, s. 4, her exercise of a general testamentary power will make the property appointed liable for her debts.

Powers of leasing, jointuring, portioning younger children, of sale and exchange, revocation, and new appointment, &c., are usually inserted in settlements. Thus, the trustees may sell and exchange the settled lands, and revoke the uses as to the lands sold; and the new lands when purchased are to be settled to the old uses. The money until the purchase is made is invested and the income paid to the person entitled to the rents; and by 22 & 23 Vict. c. 35, s. 13, if the parties by some mistake have allowed the tenant for life to receive part of the purchase-money (as if by supposing he was entitled to it by being unimpeachable for waste) power is given to the Chancery Division to relieve the purchaser against an action by the remainderman. In powers for portioning younger children, discretion is generally given to the appointor, and in default of appointment they are to take equally. An **illusory appointment**, *e. g.*, giving a very small share to one, was formerly forbidden, but as it was diffi-

cult to know where to draw the line, it is now permitted. (11 Geo. IV. & 1 Wm. IV. c. 46.) **An exclusive appointment,** *e. g.*, entirely excluding any object, was also not allowed, but the law in this respect has also been altered by 37 & 38 Vict. c. 37, and it is permitted in the absence of words to the contrary. But any exercise which may enure for the benefit of the appointor himself instead of the object intended is called a **fraud on a power**, and is void. (*Aleyn* v. *Belchier*, 2 W. & T. Cas.)

It is not necessary that the power should be alluded to in the exercise. Any ordinary assignment is sufficient, provided the solemnities dictated by the creator are adhered to; and if the appointor has also an estate, he may exercise the power and convey by way of **further assurance**; so that if the power is defective in execution, the title of the purchaser will be upheld by the conveyance.

CHAPTER III.

DEEDS.

Deeds.

ALL kinds of real property are now conveyed by deed of grant, owing to sect. 3 of the Real Property Amendment Act, 1845 (see p. 156), except a conveyance by an infant in gavelkind lands, which, being excepted from that Act, is still conveyed by feoffment in writing. **A deed** is a written instrument on paper or parchment sealed[1] and delivered. At present it is always signed as well. When made between two or more parties it is called an **indenture.** Before the Real Property Amendment Act, no person could take an interest in or benefit by a covenant concerning an estate in land, unless he was named in the indenture as one of the parties; but by the fifth section of that Act, this is no longer necessary; and by the same section, a deed may take effect as an indenture without being actually indented; that is, cut in a waving line at the top. Witnesses to the execution of a deed are not absolutely necessary (though always advisable), unless

8 & 9 Vict. c. 106, s. 5.

[1] By s. 45 of the Conveyancing Act, 1881, the donee of a power of attorney may execute any instrument, &c., in his own name and with his own seal and signature. Before this Act it had to be done in his principal's name and seal. By s. 47 payments by attorneys under powers without notice of the death, lunacy, &c., of the principal, or the revocation of the power, are protected, the section not affecting any recital against the payee of any person interested in money so paid in. By the Conveyancing Act, 1882, ss. 8, 9, if a power of attorney given after the Act (i) for value is expressed to be irrevocable, or if (ii) given for value or not is expressed to be irrevocable for a year or less from date, then in favour of a purchaser, it shall not be revoked in case (i) at any time, or in case (ii) during the fixed period, either by anything done by the donor without the concurrence of the donee, or by his death, marriage or bankruptcy.

required by statute, as in the case of the Mortmain Act, which compels the attendance of two witnesses, or to witness the execution of powers in executions as stated on p. 168, and in a few other cases.

A deed made by one party is called a **deed poll**, because it was never indented, but polled or shared even.

How avoided. If it is not on paper or parchment, or not sealed, or if there is no delivery, it is void *ab initio*. It may also be subsequently avoided—

1. By the disagreement of the parties whose consent is necessary to enable it to stand; as repudiation by a person on attaining full age of a deed executed by him during infancy, though this is subject to exception.
2. By cancellation (or other obliteration), *i. e.*, having lines drawn over it in the form of lattice-work or *cancelli*.
3. By a material alteration, *secus* an immaterial one, after delivery, if made by a stranger (*Pigot's Case*, 11 Co. 27), or by a party. (*Aldous* v. *Cornwall*, L. R. 3 Q. B. 573.) But all interlineations, &c., are presumed to be made before delivery; for an alteration afterwards is a fraud; and fraud will not be presumed. The practice is to notice such alteration in the attestation. Any appearance of alteration in a suspicious place must be accounted for by the party to be benefited.

It may be released by deed, or after breach by accord and satisfaction, where it is not to pay a sum of money or to do a certain duty. (*Blake's Case*, 6 Rep. 44.)

In regard to the construction of deeds it should be remembered—

Construction of deeds. 1. That every clause is construed most strongly against the grantor, as he is considered to be alive to his own interests, and to give as little as he can. Thus, if A grants

Dale "to B and his heirs male," the word male implies that a fee tail is intended, but the words of procreation are wanting, and B will take a fee simple, the estate given by the word heirs alone. But should the Crown be the grantor, the presumption is in its favour, and the grantee cannot take an estate tail because of the omission of the words "of the body," neither can he take a fee simple because of the insertion of the expression "male;" therefore, as it is a case of doubt, he will take nothing.

2. That the construction should uphold the gift if possible *ut res magis valeat quam pereat.* This is almost akin to the above. Suppose A, tenant in tail, grants a life estate generally to B; it will be supposed that the grant is for A's life, not B's, for he could not make a grant for B's life, and the whole instrument would be vitiated.

3. That in repugnant clauses the first should be upheld. Thus, if A grants Dale "to B in trust to pay or permit C to take the rents and profits," the word "pay" implies an active, and "permit" a passive trust. It will be construed as an active trust, and B will retain the legal estate. On the other hand, if a similar expression occurs in a will, the final clause would be accepted, the testator being supposed to have changed his mind, and his last wishes are preferred to former ones. *Voluntas ambulatoria est usque ad mortem.*

An illegal consideration vitiates a deed *in toto*, but should the consideration be legal and there be several covenants, those illegal only are struck out, and the instrument thus stripped stands. The consideration never need be expressed,[1] for the deed being a solemn act, and one made with deliberation, implies it.

By s. 53 of the Conveyancing Act, 1881, a deed expressed to be supplemental to a previous one shall have effect as if it was made by way of endorsement on it.

[1] There are some exceptions to this rule: *e.g.*, a covenant to stand seised, and bargain and sale.

[To create a fee simple it has hitherto been necessary to use the word "heirs," no other expressions being of the slightest avail; they would only have passed a life estate to the donee, excepting— **Words necessary to create a fee simple in a deed.**

1. In a will where no words of limitation have been required since 1 Vict. c. 26 (see *post*).
2. In all releases (excepting those "to enlarge an estate," as where a remainderman releases to the particular tenant).
3. In a grant to a corporation sole where successors could be used, and if to the Crown no words of perpetuity were required, or
4. To a corporation aggregate successors if anything was needed.
5. In a contract for the sale of lands, for then an equitable interest alone passed.
6. In a conveyance by fine or recovery (now abolished).
7. Where an estate was given in frank-marriage, "frank-marriage" alone was wanted.
8. In a release by joint tenants.
9. Where words of reference were used, as "grant to A and his heirs, and to B in the same manner."
10. In conveyances by the Inclosure Commissioners.
11. In a grant to the heirs of A, A's heir will take a fee simple; not, however, if it was to the "heir of A."

Also in giving an estate tail, the words "heirs," and also some words of procreation, as "of the body" or "by his wife" (*Doe* d. *Brune* v. *Martyn*, 8 B. & C. 497), were necessary. Therefore, "issue," or "seed," or "children," or "offspring," merely passed a life estate. But such words were permitted in wills, even before the Wills Act (7 Will. IV. & 1 Vict. c. 26), if the intention to confer an entail was clear, for greater latitude of expression has always been allowed to testamentary dispositions (where the in-

tention is regarded), and the same applies to equitable interests.]

There is now a great change by the Conveyancing Act, 1881, s. 51. A fee simple may be given in a deed by the use of the words "in fee simple" only; and an estate tail by the words "in tail" or "in tail male" or "female." Therefore the words "heirs" for a fee simple, and "heirs of the body," or other words of procreation, for a fee tail, are no longer essential.

According to the rule in *Wild's Case*, 6 Rep. 16, a devise to A and his children gives him an estate tail if he has no children at the time of the devise; if he has children they take a joint estate for life. In the recent case of *Clifford* v. *Koe*, L. R. 5 A. C. 1880, it has been held that the rule in *Wild's Case* is not to be departed from. The word "children" means issue of the first generation. The primary sense is displaced when the rule is applicable, and the word becomes a word of limitation and not of purchase.

Parts of a deed.

The parts of a deed are the premises, the habendum and tenendum, reddendum, conditions, covenants and conclusion.

Exceptions which often occur in deeds are used when the grantor wishes to retain a portion of the estate, *e. g.*, "grant Dale to A **except** the field X."

Reservations create rights not formerly in existence and issuing out of the land—*e.g.*, "Grant Dale to A, reserving a rent of £50." A reservation differs from an exception in that the grantor has a new estate, whereas by an exception he merely retains a portion of his old one. The reservation is in fact the reddendum.

Saving clauses are frequently inserted at the end of deeds restricting the operation of the earlier parts; for instance, inserting in a mortgage a condition that a power of sale shall not interfere with the right to foreclose; only

the clause must not be utterly repugnant to the gist of the deed or else it is void; for, as stated above, if there are repugnant clauses in a deed, the first is accepted.

Provisoes are similar to saving clauses, and limit what has been said before. Both of them have much the same effect as the word "but" in ordinary conversation. A good instance is a proviso for redemption in a mortgage or a proviso for the cesser of a long term when it is satisfied.

Appurtenances are all those rights which are necessary for the complete enjoyment of the property, as rights of way and fixtures.

CHAPTER IV.

VENDOR AND PURCHASER.

1. Contracts and Conditions of Sale. 37 & 38 Vict. c. 78.

LAND is sold by private treaty or by public auction. In either case the vendor is required to show a 40 years' title, when a freehold, copyhold, or even a leasehold estate is sold.[1] In the case of an advowson, he must show 100 years' title; and there are a few more cases in which longer than a 40 years' title is required. Thus on the sale of a long lease, or of property granted by the Crown, or of tithes, or of a reversion, the creation of the lease, original grant from the Crown, tithe, or reversion, must be deduced. This often cannot be done without expense; therefore it is always best that a **contract of sale** should be prepared, and in the contract there should be a condition limiting the length of title he is to show, and throwing any further expenses of proof on the purchaser; also any further conditions [2] should be inserted which the state of the title requires, and the title itself should necessarily be investigated before the contract is entered into, to be sure that there are no fatal objections which cannot be specially provided against.

Subject to contrary agreement, the purchaser cannot demand the production or any abstract of any document

[1] Before this Act sixty years' title was necessary.

[2] As to their extent and nature a solicitor should bear two things in mind:—

1. That it is his duty to protect his client against troublesome inquiries which may be guarded against by reasonable conditions.
2. That the insertion of very stringent conditions may damp a sale and deter purchasers (1 Prid. Conv. *Conditions of Sale*).

dated prior to the statutory or agreed root of title, even where such document creates a power exercised by the instrument which is the root of title or any subsequent instrument; and recitals as to prior title are to be presumed correct. (Conveyancing Act, 1881, s. 3, subs. 3.) But if the earlier document shows a serious defect—*e. g.*, that the vendor had only a life estate and not the fee simple, the purchaser still may object on that account, and the vendor will not be justified in concealing the defect. (*Smith* v. *Robinson*, 13 Ch. D. 148.)

Leaseholds. [In leaseholds it has been usual to insert conditions that the abstract shall commence with the lease, and that it shall be assumed that all the covenants have been performed to the end of the sale, of which the last receipt for rent shall be sufficient evidence.] Such conditions are no longer necessary. [Until recently the vendor, under an open contract was bound, in the absence of contrary agreement, to produce the lessor's title.] The Vendor and Purchaser Act of 1874, s. 2, subs. 1, has provided that under a contract to grant or assign a term, the freeholder's title shall not be called for; yet as that Act did not prevent the purchaser of an underlease from calling for the title of his sublessor, and requiring it to be shown that the immediate reversion was a freehold, it was still advisable to insert the clause.

The Conveyancing Act, 1881, s. 3, subs. 1, provides, subject to there being a contrary intention expressed, that on the assignment of an underlease, the title to the leasehold reversion shall not be called for. Section 13 extends this to the case of an underlessee granting a sublease. But a lessor granting a sublease must show the title of the term for which he holds.[1] The clause does not protect the vendor when a

[1] Illustrations:—
1. A, freeholder, grants a lease to B.
2. B grants a sublease to C.
3. B assigns to C.
4. C assigns to D.
5. C subleases to D.

By the Vendor and Purchaser

defect in the prior title appears on the face of the abstract (*Sellick* v. *Trevor*, 12 L. J. N. S. Ex. 401), nor affect the purchaser's right to object to the earlier title if he can show it to be defective *aliunde*. (*Darlington* v. *Hamilton*, Kay, 550.)

When land held by lease or underlease is sold, the purchaser shall assume the validity of every lease and the performance of covenants, on production of the last receipt of rent. (Conveyancing Act, 1881, s. 3, subs. 4, 5.)

When enfranchised copyholds were sold it has been customary to stipulate against calling for the title of the lord down to the time of enfranchisement. By the Conveyancing Act, 1881, s. 3, subs. 2, this is no longer necessary.

Conditions of sale.

When land is sold by public auction, among the principal conditions are the following: That the highest bidder shall be purchaser; that a deposit shall be paid; that the abstract and requisitions shall be delivered in a certain time; that the purchaser shall pay interest in the event of delay; that the vendor may rescind, if the purchaser objects to the title, on the return of the deposit without interest; that error in description shall not annul the sale, but shall be made good by compensation; that the purchaser shall pay for the conveyance, &c.; that the vendor shall resell in the event of default by the purchaser, and the deposit shall be forfeited and the loss on resale shall be recovered as liquidated damages; and there are also special stipulations suitable to each particular case. (See Prid. Conv., v. 1, *Conditions of Sale.*)

It should also be stated in the conditions of sale whether this land is to be sold without reserve, for if it is to be so sold, the vendor must not employ any person to bid at the

Act, 1874, s. 2, A's title in (2) and (3), *supra*, need be shown. By s. 3, subs. 1, of the Conveyancing Act, 1881, in (4), and by s. 13 in (5), C need not show B's title. Therefore each party must now show his own title, but not, in the absence of contrary stipulation, the title of the party through whom he claims.

sale, neither must the auctioneer intentionally take any bidding from such person. (30 & 31 Vict. c. 48, ss. 4, 6.)

Every contract of sale of land, tenements, and hereditaments, and every interest in or concerning them, must be in writing, signed by the party to be charged or his agent lawfully authorized, or else no action will lie. (Stat. Frauds, s. 4, subs. 3.) Equity, however, will dispense with the statute and grant specific performance when there has been no writing owing to fraud, or when there has been part performance, and in one or two other cases. (*Lester* v. *Foxcroft*, 1 W. & T. Cas.)

2. Delivery of abstract.

The vendor's solicitor then delivers the **abstract**—documents furnishing a good root of title. A purchase deed, marriage settlement, and especially a mortgage (as then the title is sure to have been thoroughly investigated before the money was advanced), is a good instrument to begin the abstract upon. Documents first abstracted should, if possible, deal with the entire legal and equitable estate,[1] and show a good title to both, and the interests of all persons concerned should appear. The title is continued in regular order, estates held under separate titles being separately dealt with. The documents forming part of the title are abstracted in chief, and statements as to matters of pedigree inserted *seriatim*.[2] All deeds bearing on the legal estate are noticed (22 & 23 Vict. c. 35, s. 24, making the solicitor liable for a misdemeanour in the event of their suppression), judgments, &c., and private Acts of Parliament are stated, and plans (which the vendor fur-

[1] Deeds not affecting the right to sell need not be abstracted, as where a mortgage is made to persons in one deed, and by another it is declared that they are trustees for others, the latter need not be noticed.

[2] The Conveyancing Act, 1882, s. 4, provides that where a lease is made under a power contained in any instrument, any preliminary contract relating to it shall not, for the purpose of the deduction of the title to an intending assignee, form part of the title. This will obviate inquiry whether the contract was in accordance with the power. The title will commence with the lease, and there will be no power to go behind.

nishes) are occasionally referred to. The parcels should be clearly identified, and as this is often difficult, some qualification of the purchaser's right in this respect is generally introduced (see *Flower* v. *Hartropp*, 6 Beav. 476); and there should be a clear deduction of both legal and equitable estates, and the deeds should be properly stamped, executed and attested, and receipts endorsed, and also enrolled and acknowledged when enrolment or acknowledgment is required. (Dart, V. & P., v. 1, 279, *et seq.*; Prid. Conv., v. 1.) In the title to an advowson a list of presentations is annexed to the abstract to show that acts of ownership have been exercised. (Hughes' Practice of Conv., v. 1, p. 106.)

3. Requisitions. The purchaser's solicitor peruses this abstract and sends in **requisitions** if necessary. Thus, suppose A purchased an estate forty years ago, and gave it by will to B, his son, who died intestate, and C, his grandson, wishes to sell; the purchaser would require to be satisfied of the death and intestacy of B, and the heirship of C,[1] and that letters of administration were taken out to B. The succession duty receipts, payable on any devolution by death since 19th May, 1853, will also be wanted, and proof that nobody has incumbered, and a requisition that B's widow, if alive, must concur in releasing her dower, for her claim to dower is good against the heir, and if A married previous to the Dower Act (3 & 4 Will. IV. c. 105; also see p. 35), his widow also, if living, must release her dower. There should also be proof that A was seised when he made the

[1] C's heirship could be shown thus: the marriage certificate would prove B's marriage; the baptismal certificate, or a certified extract from the register of births, would prove his birth; the burial certificate, or a certified extract from the register of deaths, would prove B's death; and a statutory declaration from some member of his family would be required to prove his identity. Or any fact of this nature can be proved by a recital in an instrument twenty years old. If the solicitor overlooks notice of any incumbrance negligently he will be personally liable for any loss his client may have suffered (Dart, V. & P. v. 1, p. 454).

will and died, and the will should be produced. It should always be seen that every document has been properly executed and attested, enrolled, registered, or acknowledged if necessary, and that the proper stamps have been affixed.

Application may be made summarily by either party to obtain the decision of a judge at chambers in respect of any requisition or objection, or claim for compensation, or other matter arising out of the contract (not affecting its validity). (37 & 38 Vict. c. 78, s. 9.)

4. Completion. The requisitions being answered by the vendor's solicitor, and the title proving satisfactory, the purchaser's solicitor prepares the draft conveyance, which is perused by the vendor's solicitor, and if approved of is engrossed by the former, who then searches for incumbrances, and if there are none he proceeds to complete. On the day appointed the purchaser's solicitor attends; the conveyance is executed by the vendor, the purchase-money paid, and the title deeds handed over. By the Conveyancing Act 1881, s. 8, the purchaser is not entitled to require that the conveyance be executed in his presence, or in that of his solicitor, as has hitherto been the rule; but he is entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor. If the purchase-money has not been paid, the vendor will have an equitable lien on the estate; and the circumstance that the money is purported to have been paid and a receipt endorsed, will not alter the fact. The vendor must bring his action in twelve years; six years are allowed for disabilities, of which absence beyond the seas is not one, but thirty years is the extreme limit. (See *post*, Pt. 2, c. 8.) The production by a solicitor of a deed having a receipt, the deed being executed or the receipt signed by the person entitled to give it, shall be a sufficient authority to receive the purchase-money. (Conveyancing Act, 1881, s. 56.) This section does not enable a vendor to give a greater authority to receive the pur-

37 & 38 Vict. c. 57. The Real Property Limitation Act of 1874.

chase-money than he might have given without it, but it only allows such authority to be implied as might previously have been given expressly. Thus the solicitor of trustee vendors cannot receive it under this section, as they could not authorize their solicitor to receive it. (*Bellamy* v. *Metropolitan Board of Works*, 24 Ch. D. 387; *Re C. Flower to Metropolitan Board of Works*, W. N. 1884, p. 186.)

From the time when the contract is signed, the death of either party will not interfere with the completion, for equity considers that the estate belongs to the purchaser—losses happening fall upon him[1]—and it will pass under a general bequest of real property, or descend to the purchaser's heir. Serious mistakes have often arisen from ignorance of this fact, persons not being aware that the mere signature of the contract changes the nature of the property, even before the conveyance is made. Since 30 & 31 Vict. c. 69, s. 2, the **vendor's lien** falls under Locke King's Act on testacy, and therefore the devisee who takes the estate takes it *cum onere*. (See p. 63.) 40 & 41 Vict. c. 34, extends this to the case of the purchaser dying intestate; before this time the personal representatives had to pay the vendor.

If the vendor dies after completing the contract of sale, his personal representatives shall have power to convey the land to the purchaser. (Act, 1881, s. 4.) Formerly the real representative had to do this, and if he was an infant, a vesting order under the Trustee Act of 1850 was necessary.

If after the contract is signed, the purchaser refuses to complete, the Court will compel him to do so, unless there

[1] The purchaser is not entitled to the insurance money if the premises are burnt down after the contract and before completion (*Raynor* v. *Preston*, 44 L. T. 787). Therefore there should be a clause in the contract assigning the benefit of any insurance then on foot to the purchaser. The vendor, however, is not entitled to the insurance money (*Preston* v. *Castellain*, 31 W. R. 557).

has been some substantial misdescription or misunderstanding as to the terms, and one which does not admit of compensation. The vendor can bring an action for specific performance for this purpose. The question whether the misdescription is a substantial one or not must depend upon the circumstances of the particular case. If the purchaser gets what he bargains for he must take a compensation for any deficiency of value.

A purchase made from a bankrupt, if *boná fide*, and before the order of adjudication and without notice of the bankruptcy, cannot be set aside. (46 & 47 Vict. c. 52.) If only a contract of sale has been executed the trustees in bankruptcy must carry out the sale. If the purchaser becomes bankrupt, his trustees may disclaim the contract; if they do not the vendor is in the position of a secured creditor (having his lien) under the bankruptcy.

[When an incumbrance existed on land which there was no present right to pay, it was sometimes an impediment to its transfer, *e.g.*, if it was desired to be sold in lots.] The Conveyancing Act, 1881, s. 5, allows a judge of the Chancery Division on summons to allow payment into Court of such a sum as will meet the incumbrance, and any costs and interest not exceeding one-tenth of the amount paid in; and the Court may then declare the land to be freed from the incumbrance.

If the purchaser has notice of any incumbrances he, of course, takes the property subject to those incumbrances. He is not, however, deemed to have notice of any instrument, unless it is within his knowledge or would be if he had made proper inquiries or inspection (thus, he, if he knows of a lease, is considered to know its contents); or it has or should have come within the knowledge of his legal agent in the *same* transaction. (Conveyancing Act, 1882, s. 3.)

Incumbrances. The possession of the title deeds is the best security against there being any mortgages or charges on the land, but it is not an entire safeguard—it being possible for the

property to be incumbered without the incumbrancer having the possession of the deeds.

Many charges, however, must now be registered before they can affect a purchaser. In Middlesex and Yorkshire,[1] by statutes of Anne, all transactions concerning land must be registered (except copyholds, leases at a rack-rent, or not over twenty-one years, taking effect in possession, or lands registered under the Land Transfer Act, 1875), and the purchaser can search the register;[2] in other counties any annuities or rent charges for lives (unless created by will or marriage settlement), if made after the 26th April, 1855 (18 & 19 Vict. c. 15, ss. 12, 14), are to be found by examination in the office of the Common Pleas, and if before that date, in the office of the Chancery Division. Crown debts before the 1st November, 1865, and judgment debts before the 29th July, 1864 (Lord Westbury's Act, 27 & 28 Vict. c. 112), and writs of execution after that date, every *lis pendens*, deeds acknowledged by married women, and fines and recoveries, are to be found in the offices of the Common Pleas, and disentailing deeds in the Chancery Division of the High Court, while bankruptcy records are kept at the search office of that Court.[3]

Registration. An Act was passed, Lord Westbury's Act of 1862, with the object of rendering registration universal, but being a failure it has been superseded by the Land Transfer Act of 1875, 38 & 39 Vict. c. 87, with a similar view. The

[1] The Yorkshire Registries Acts have been repealed and re-enacted and consolidated by the Yorkshire Registries Act, 1884, 47 & 48 Vict. c. 54.

[2] But want of registration will not cause an incumbrancer to be postponed to a subsequent one, if the second has notice of the first, for the object of registration is merely to protect innocent parties (*Le Neve* v. *Le Neve*, 2 W. & T. Cas. p. 32). Further, if a will of such land is not registered in the proper period (six months) an assurance to a purchaser by the devisee shall, if registered first, prevail over one by the heir (37 & 38 Vict. c. 78, s. 8).

[3] Searches for judgments and other documents may now be made at the Central Office by an official, whose certificate of result of search is conclusive in favour of a purchaser, and a solicitor obtaining an office copy of it is not answerable for any loss from error (Conveyancing Act, 1882, s. 2).

first Act made it necessary to show a marketable title before registration, whereas the present one permits an absolute qualified or possessory one to be registered, and applies to all freeholds and leaseholds for lives or years of which twenty-one are unexpired; partial interests are not registered, nor questions as to boundary investigated. Registration is not compulsory, but when a title is once put on the register it cannot be taken off again.

Who keeps the deeds.

The purchaser will be entitled to the title deeds unless—

1. He takes only an equitable estate (which can be created by mere agreement satisfying the Statute of Frauds).
2. The sale is of a reversionary interest—then the tenant for life retains the deeds. Owing to the inability of expectants to produce the deeds their sales were frequently for far less than the full value of their property, and equity was always interfering to set them aside. But 31 Vict. c. 4, has enacted that no sale shall be set aside merely because of undervalue, though a very unfair price may still afford presumption of fraud.
3. The property is sold in lots,[1] and the vendor retains any portion, in which case the vendor keeps them. (Vendor and Purchaser Act, 1874, s. 2, subs. 5.) Otherwise the purchaser of the largest portion in size, not in price, keeps the deeds. Covenants for production are in both cases entered into.[2]

Acknowledgment or undertaking.

By the Conveyancing Act, 1881, s. 9, where a person retains possession of documents and gives to another an acknowledgment in writing of the right of that other to pro-

[1] A purchaser of two or more lots has not a right to more than one abstract of the common title, except at his own expense (Conveyancing Act, 1881, s. 3, subs. 7).

[2] The Vendor and Purchaser Act, 1874, s. 2, subs. 3, has provided that the inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title, in case the purchaser will, on the completion of the contract, have an equitable right to their production.

duction of them or delivery of copies, or an undertaking in writing for their safe custody, such acknowledgment or undertaking shall generally have the same effect as the ordinary covenants which are entered into for that purpose. The differences between an undertaking and an acknowledgment are that the acknowledgment binds the documents, and confers a right to specific performance of the obligations, while an undertaking makes the holder personally responsible for their safe keeping, but confers no right as to the production on the person to whom it is given. An acknowledgment and undertaking are equivalent to the ordinary covenant for production.

Vendor's expenses. The vendor's expenses are, in the absence of stipulations to the contrary—preparing the abstract, producing the deeds[1] (in fact he must make out and deduce his title) which are in his own possession, and finding those which are not; getting in any outstanding legal estate, and the concurrence of the necessary parties; and before the Vendor and Purchaser Act of 1874, s. 2, subs. 4, he had to pay for the covenant for the production of the title deeds delivered to the purchaser.

Purchaser's expenses. The purchaser pays for the cost of the perusal of the abstract, comparing it with the title deeds, preparing the conveyance, the expenses of the stamp and parchment, and for the covenants for the production of the deeds he requires. By the Act, 1881, s. 3, subs. 6, he also pays for the production and furnishing of copies of all documents and certificates, abstracting title deeds (*Re Johnson and Tustin*, W. N. 1884, 200), and furnishing information not in the vendor's possession; and also for attested copies of documents retained by the vendor.

On the completion of a contract of sale, matters in deeds, &c., which are twenty years old, shall be taken to be sufficient evidence of the facts they contain, unless proved to be

[1] If he does not produce the deeds in London or at his residence he must pay the additional costs occasioned thereby (*Hughes* v. *Wynne*, 8 Sim. 85).

inaccurate, or unless there is any stipulation to the contrary. (Vendor and Purchaser Act, 1874, 37 & 38 Vict. c. 78, s. 2, subs. 2.)

Example of a deed. The following is a simple specimen of a deed of grant; ordinary deeds are usually spun out to a much greater length by the number of covenants, special conditions, recitals, &c., which they contain.

Date. [1] "This Indenture made the ——— of ——— 1884, be-

[1] The first part of the deed is called the **premises**. It sets forth the date of the transaction, the parties, and the **recitals**. These last are a recapitulation of previous agreements, deeds, &c., from which the conveyance originates. Then comes the operative part, including the consideration and habendum and the covenants, if any are required.

Covenants. Covenants have superseded the old warranties. Warranties were—

1. Express—where a man warranted that if the estate was taken away from the donee he or his heir would give him lands of equal value. The **tortious** effect of this is taken away by the fourteenth section of the Fines and Recoveries Act, 3 & 4 Will. IV. c. 74.

2. Implied.—The words "partition" between coparceners and "exchange," implied re-entry in the event of eviction; "grant" and "give" also implied warranties; but by the fourth section of the Real Property Amendment Act, exchange and partition are in no case to imply any condition, nor are give or grant to do so, unless authorized by Act of Parliament, as under:— **8 & 9 Vict. c. 106.**

1. Conveyances to the governors of Queen Anne's bounty, or by companies under the Lands Clauses Consolidation Act, section 132, where "grant" implies covenants.
2. The Yorkshire Registry Acts, where "grant, bargain, and sell," imply those for quiet enjoyment and further assurance, unless restrained by express words.
3. By the Conveyancing Act, 1881, the words "beneficial owner," "trustee," "mortgagee," "settlor," &c., imply covenants (see next page).

"Demise," unless qualified by subsequent words, will invariably imply a covenant for quiet enjoyment.

The warranties formerly given were to the effect that the feoffor and his heirs would warrant, acquit, and for ever defend the feoffee and his heirs against all persons. They saved investigation of title; for in the event of eviction under a superior title, lands of equal value had to be given to the feoffee. Originally this bound the heir of the feoffor, although he might not have obtained any lands from his ancestor (unless it was a warranty commencing by disseisin, that is, where by the feoffment the feoffor actually disseised another). The power of warranties was checked by early statutes as working injustice; for instance, a tenant by the curtesy might by warranty have

Parties. tween A B of ———, in the county of ———, Esq. (vendor), of the one part, and C D of ———, in the county of ———, Esq. (purchaser), of the other part. **Whereas** the said A B hath contracted with the said C D for the sale to him of the freehold hereditaments hereinafter described for

Testatum. the sum of 5,000*l.* **Now this Indenture witnesseth,** that in

Consideration. consideration of the sum of 5,000*l.* paid by the said C D to the said A B, on the execution of these presents, the

Receipt. receipt of which said sum the said A B doth hereby admit,[1] and from the same doth hereby release the said C D, he

Operative clause. the said A B, as **beneficial owner,** hereby conveys[2] unto the

Parcels. said C D all the hereditaments particularly described in

Habendum. the first schedule hereunto annexed,[3] to **have and to hold** all the premises hereinbefore conveyed **unto and to the use**

Declaration of uses. **of** the said C D in fee simple[4] (or perhaps to A for life with remainders, or on what other uses may be de-

Special covenants. sired). *Then followed the covenants for title which have*

bound his heir as to lands he inherited by his mother. Express warranties have long been superseded by covenants for title, and 3 & 4 Will. IV. c. 27, s. 39, and c. 74, s. 14, have taken away the force of those implied.

[1] It has always been usual to have also an indorsed receipt, and the absence of it has been considered to give notice of the non-payment of the purchase-money. Sect. 54 of the Conveyancing Act, 1881, does away with the necessity of this, and a receipt in the body of the deed, *or* indorsed thereon, is conclusive evidence of payment in favour of a purchaser who has no notice to the contrary, by s. 55, and by s. 56 is a sufficient authority to a solicitor holding the deed to receive the money on behalf of his client. Hitherto the solicitor of the vendor could not, without special authority, give a discharge for the purchase-money.

[2] The word "grant" was formerly always used, but is now unnecessary by the Conveyancing Act, 1881, s. 49.

[3] The "general words" formerly followed, "**together with** all fixtures, commons, easements," &c., &c. But now, subject to contrary intention, they are deemed to be inserted in every conveyance by s. 6 of the Conveyancing Act, 1881, and also "all the estate clause"—"**and all** the estate, right, title, &c., of the said A B, to and out of the premises,"—by s. 63. The object of general words was to pass certain easements, &c., which, though not necessary for the use of the property, were convenient to be enjoyed therewith. "All the estate clause" was a useless formula.

[4] "And his heirs" were formerly necessary. But by the Conveyancing Act, 1881, s. 51, "fee simple" is sufficient.

hitherto been ordinarily used in conveyances. Now special covenants are alone necessary, see p. 192. **And** the said A B doth hereby covenant with the said C D[1]—*then follow any special covenants which the nature of the case may require. In simple cases there will be no covenants.*

In witness whereof the said parties have hereunto set their hands and seals, &c.

Then the Schedules are annexed.

Covenants. There are properly five ordinary covenants that the grantor (1) is seised in fee; (2) and has good right to convey; (3) the property is free from incumbrance; (4) for quiet enjoyment; (5) for further assurance. The first is usually omitted, for if he has a good right to convey the fee, he must have it. A vendor covenants for all acts since the last sale of the estate, but a mortgagor gives absolute covenants. Trustees merely covenant that they have not encumbered. Covenants should be entered into with the grantee to uses, for otherwise if there is a power of appointment, and it is exercised, they will not run with the land. (Sugden, V. & P. c. 15, s. 1.)

Covenants are also **absolute**, which are those which include the acts of everybody; or qualified, that is, restricted to those of certain persons. Curiously as it seems, a mortgagor gives absolute, while a vendor gives merely qualified covenants; but the reason is that a mortgage contemplates a mercantile transaction merely, and all he requires is a good investment for his money. Therefore title is everything. A purchaser on the other hand may be attracted to the property by attributes peculiar to itself.

[1] The words "heirs and assigns," or "executors, administrators, and assigns," may now be omitted after the covenantor's and covenantee's names; for they are imported by ss. 58 and 59, Conveyancing Act, 1881. In the construction of covenants or provisoes implied in a deed by virtue of the Conveyancing Act, 1881, words importing the singular or plural, or masculine, shall be read as also importing the plural or singular, or as extending to females.

By s. 60, Conveyancing Act, 1881, the right to sue on all obligations entered into with two or more jointly shall pass to the survivors. There is consequently no necessity to add a clause to this effect in instruments as formerly.

Covenants when implied. By the Conveyancing Act, 1881, s. 7, if in a conveyance for value, including a settlement and covenant to surrender, a person expresses that he conveys as beneficial owner, the ordinary covenants are implied; and if the property is leasehold a further covenant that the lease is valid is implied; and on the mortgage of a leasehold a further covenant for the payment of rent and performance of covenants is implied. In a conveyance by way of settlement, a covenant for further assurance is implied by a person who expresses that he conveys as settlor. In any conveyance by a person who expresses that he conveys as trustee or mortgagee, or personal representative of a deceased, a covenant that he has not incumbered is implied. Where a person conveys by direction of the beneficial owner, the beneficial owner shall be deemed to convey as beneficial owner, and a covenant on his part shall be implied. Where husband and wife convey, the wife is deemed to convey by direction of the husband, and in addition to the covenant implied on the part of the wife, there shall be implied, firstly, a covenant on the part of the husband as the person giving such direction, and, secondly, a covenant on the part of the husband in the same terms as that of the wife.

Usual Covenants on Lease of a House.

By Lessee—

1. To pay rent and taxes (except land tax).
2. To keep the property in good condition and yield it up at the end of the term (but not to repair in the event of fire).
3. To permit lessor or his agents now and then to enter and view the premises.

4. Insurance against fire, lessor naming the office.
5. Not to carry on an offensive trade.
6. Not to assign or sublet without consent.

By Lessor—

Quiet enjoyment, &c. (2 Prid. Conv.)

When the personal representative can deal with the land.

There are certain cases when the personal and not the real representative sells the land.

1. When the testator has charged his real estate with the payment of his debts, and has not devised the *whole* interest to any trustees, the executor shall sell or mortgage if necessary (22 & 23 Vict. c. 35, s. 16); but if he has devised *all the estate so charged* to trustees, they (and those who take the trust after them by survivorship or otherwise, s. 15), and not the executors, shall sell (s. 14); but for the case in which a testator has devised his whole interest charged with his debts to some one beneficially, the Act makes no provision (s. 18). (See *Johnson* v. *Kennett*, 3 M. & K. 624.) If there is a devise charged with legacies, the receipts of the legatees are still necessary. (*Horn* v. *Horn*, Sim. & Stu. 448.) But if it is also charged with debts, the absolute impossibility of obliging the purchaser or mortgagee to look to their payment exonerates him from liability, and the receipt of the devisee alone is sufficient. In *Re Clay and Tetley*, 16 Ch. D. 3, A directed his executors to pay his debts and charged his realty in case his personalty should be insufficient. It was decided that the statute gave the administrators no power to sell on the executors renouncing. It is usual to join the executors in the conveyance.

2. By the Conveyancing Act, 1881, s. 30, in cases of death, after 1st Jan. 1882, trust and mortgage estates, including copyholds (*Re Hughes*, W. N. 1884, p. 53), devolve on the personal representatives, who shall have all the powers

of and be deemed to be heirs and assigns of the deceased.[1]

3. As above stated (p. 184), by the Conveyancing Act, 1881, s. 4, when at the death of a person there is subsisting a contract enforceable against his heir or devisee for the sale of any freehold interest descendible to his heirs general, his personal representatives shall have power to convey the land. This, it may be observed, differs from s. 30 (cited *supra*), in that the legal estate still remains in the real representatives until the personal representatives exercise the statutory power.

4. Terms for years, being chattels, have always gone to the executor.

5. An estate *pur autre vie* devolves on the personal representatives at the death of the tenant *pur autre vie* before the *cestui que vie*, unless he has devised it (see *post*), or unless, it having been limited to a devisee and his heirs, he dies without heirs. (*Reynolds* v. *Wright*, 25 Beav. 100.)

Bare trustee. If a married woman is a bare trustee of any freehold or copyhold, she shall reconvey the property in the same manner as if she was a *feme sole*. It is not quite settled who is a bare trustee; according to Mr. Dart (Dart, V. & P. 317), a bare trustee is a person whose duties as trustee are over, or who had none, and nothing remains to be done but to hand the property over to the *cestui que trust*, he

[1] If the death occurred before 7 Aug. 1874, the legal estate went to the real representative (*Braybroke* v. *Inskip*, Tud. Cas. Pry.). In the case of a trust, if the death occurred between that date and 1 Jan. 1876,—by the Vendor and Purchasers Act, 1874, s. 4, it went to the personal representative; and if between 1 Jan. 1876, and 31 Dec. 1881, if the trustee died intestate, to the personal representative; and if he died testate, to the devisee, by the Land Transfer Act, 1875, s. 48. In the case of a mortgage, on death, between 7 Aug. 1874, and 31 Dec. 1881, the personal representative had power to reconvey (not transfer, *Re Spradbery's Mortgage*, 14 Ch. D. 514), but if he did it was vested in the real representative.

having been called upon to do so. This view was approved of in *Christie* v. *Ovington*, 1 Ch. D. 279; but in *Morgan* v. *Swansea Sanitary Authority*, 9 Ch. D. 582, Jessel, M. R., appeared to think him merely a trustee without any beneficial interest, whether he had active duties to perform or not. (*Lysaght* v. *Edwards*, 2 Ch. D. 499, 506.)

CHAPTER V.

SETTLEMENTS—CONVEYANCES BY RECORD AND SPECIAL CUSTOM.

Settlements.

Settlements.—Settlements are voluntary or for value. A voluntary settlement is one for which no value is given, although the consideration may be of a good and laudable nature, such as a post-nuptial gift. Such gifts are binding between the parties themselves, though there are one or two apparent exceptions; *e. g.*, if a man conveys his lands to trustees to sell and pay his creditors, he may change his mind and have the property back, provided his intention has not been communicated to the creditors and they have not assented thereto; for this conveyance is supposed to be for his benefit and not for theirs. (*Garrard* v. *Lauderdale*, 3 Sim. 1.)

Conveyances in fraud of creditors. Twyne's Case, 1 Sm. L. C. p. 1.

By 13 Eliz. c. 5, all alienations of property, of every description, are void against creditors, if made with the intention of defrauding them, and lapse of time is not a bar to setting aside such a conveyance. (*Three Towns Banking Co.* v. *Maddover*, 31 W. R. 720.) The vendor must be insolvent at the time, or shortly after, and the question whether the intention is to defraud creditors or not is one of evidence, and all subsequent creditors are permitted to claim as long as any of the prior ones remain unpaid; and by 27 Eliz. c. 4, all voluntary conveyances, excepting gifts of pure personalty, can be defeated by subsequent ones for value, even though the purchaser knows of the previous settlement. Therefore covenants are very important in voluntary settlements, as an action will lie on

them against the settlor, if he exercises this statutory right of selling. The covenant for further assurance (Conveyancing Act, 1881, s. 7, sub-s. 1, Form E.) is implied when a person conveys as settlor. If a person is induced to marry a voluntary grantee on account of the settlement, or if the property has passed into the hands of a *bonâ fide* purchaser without notice of the voluntary nature of the original conveyance, or of any person claiming through such a purchaser (*Harrison* v. *Forth*, Prec. Ch. 51), or if the heir of (and not) the original grantor (himself) makes the second conveyance, the purchaser for value cannot get the estate, or the money substituted for it in the hands of the volunteer (*Prodgers* v. *Langham*, 1 Sid. 133); neither if the purchaser, after having entered into the contract, refuses to complete, will equity interfere at the instance of the vendor to compel him, on the ground of a voluntary conveyance being good against the settlor.

If the settlement is in favour of a charity it cannot be defeated, though voluntary. (*Att.-Gen.* v. *Corporation of Newcastle*, 5 Beav. 307.) The exercise of a power of sale by a mortgagee does not, under 27 Eliz. c. 4, destroy a voluntary settlement which has been made subsequent to the mortgage, but the volunteer is entitled to any surplus as against the mortgagor. (*Re Wolhampton's Estate*, W. N. 1884, p. 88.)

Any slight consideration is sufficient to prevent the alienation from being voluntary. Thus on a settlement of leaseholds the liability to perform the covenants is sufficient (*Price* v. *Jenkins*, 5 Ch. D. 619), though on the other hand, some settlements, apparently for value, have been construed to be voluntary. Thus, where A., having lived with a woman, eventually married her, and property was settled in purported consideration of the marriage, the Court held that this was wholly illusory as a consideration. (*Colombine* v. *Penhall*, 1 Sim. & Giff. 228.)

By 46 & 47 Vict. c. 52, s. 47 (Bankruptcy Act, 1883),

any voluntary settlement shall be void against the trustee in bankruptcy if the settlor becomes bankrupt in two years from its date; and also if he becomes bankrupt in ten years from its date, unless the parties claiming under the settlement can prove that the settlor was at the time of making it able to pay all his debts without the aid of the property comprised in it, and that the interest of the settlor in such property had passed to the trustee of such settlement on its execution. Settlements on the wife or children of property which has accrued to the settlor after marriage in right of his wife being excepted.

Also covenants in consideration of marriage for the settlement of future property on the wife or children shall be void against the trustee in bankruptcy unless the property has been actually transferred before bankruptcy.

Infants' marriage settlements. 18 & 19 Vict. c. 43, ss. 1, 2, 3, 4.

Settlements of both realty and personalty are usually made on marriage to provide for the wife and children. An infant may, with the sanction of the Chancery Division, make or contract for a valid settlement, but he must not exercise any power which is expressly forbidden to be exercised by an infant, and if, having exercised any power or disentailing assurance, he dies under age, such power or assurance shall be absolutely void. The Act does not apply to females under seventeen or males under twenty.

Form of settlement. Husband's for life. Jointure to wife. Remainder to first and other sons in tail.

The usual form of settlement on marriage of property belonging to the husband is to vest the real estate in trustees to the use of the settlor until the marriage takes place; then to the use of the husband for life, allowing pin-money for the wife, and a rent-charge or annuity as a jointure in the event of her surviving. Then subject to portions for younger children, a term for 1,000 years being given to trustees to raise them, the estate is given to the use of the first and other sons of the said husband by the said wife, successively according to seniority in tail male, with remainder to the use of the settlor in fee simple.

Then follow the trusts of the pin-money term, with trusts of the term to secure the jointure and portions. Power is then given to the husband to charge the estate with jointure and portions in favour of a future wife and children by a future marriage. Then follow powers of management to the trustees during the minority of the tenants in tail—powers of leasing, of sale and exchange, of enfranchising copyholds, making partitions, and the other usual provisions. (2 Prid. Conv. 12 ed. p. 309, Prec. 27.)

This is merely a slight sketch; every settlement is practically much more complicated, as many powers, such as that of sale and exchange and leasing, are given to the trustees and to the husband. Very often pin-money is secured for the wife, and a rent-charge by way of jointure for her after the death of the husband, and portions for younger children; and also there are special clauses and provisoes adapted to the circumstances of each particular case; besides, all settlements vary widely according to the intentions of the parties.

Limitations are sometimes given to daughters in common in tail, with remainder over to the survivors, which are termed **cross remainders**; they must be given expressly in a deed, but in a will may also be raised by implication (2 Jar. Wills, 458, &c.), as where tenements are devised to two persons severally in tail, and on failure of their issue to a third person, with an apparent intention that he shall take the entirety, or none at all. (6 Cruise, T. 38, c. 15, ss. 26—30.)

Rectification of settlements.

If the settlement and the articles are both executed before marriage the settlement will be considered the binding instrument, unless—

1. It is clearly proved by parol or other evidence that the parties intended it to correspond with the articles; or unless

Legg v. Goldwire, 1 W. & T. Cas. p. 17.

2. It itself professes to be made in pursuance of them.

But when the settlement is made after marriage it will in all cases be controlled by the articles and rectified to agree with them; except against a purchaser for value without notice of the article. It was decided by Lord Northington, in the case of *Corwall* v. *Mackrill* (2 Eden, 344), that a purchaser for value with notice was equally favoured, but this decision has been overruled. (*Davies* v. *Davies*, 4 Beavan, 54.) Marriage articles are not so common as when fines and recoveries were in vogue; as then it frequently took a long time to disentail and resettle an estate.

The Conveyancing Act, 1881, s. 42, superseding the ordinary maintenance clause usually inserted in settlements, gives to trustees extensive powers of management of the land of males and unmarried females during infancy; and s. 43 authorizes the application of the income for their maintenance and the accumulation of any surplus.

22 & 23 Vict. c. 35, s. 23, dispenses with the clauses for the indemnity and reimbursement of trustees; and the Act 1881, s. 37, allows them to compound and settle all claims.

22 & 23 Vict. c. 61, s. 5, provides that after a final decree of nullity or dissolution of marriage the Court may inquire into the existence of settlements, and make such orders with reference to the application of the property settled for the benefit of the children or parents as it may please. By the Matrimonial Causes Act, 1878 (41 Vict. c. 19), the Court has this power, although there are no children by the marriage.

Trustees. The trustees, in whom the legal estate is vested in

settlements, may of course refuse the responsibility and disclaim; but having once accepted, they cannot retire, unless by—

1. Consent of all the *cestuis que trust* being *sui juris.*
2. Virtue of such a power being given to them in the settlement.
3. Sanction of the Court.
4. If more than two in number, by deed, with the consent of the rest, and of the person (if any) empowered to appoint new trustees. (Conveyancing Act, 1881, s. 32.)

Appointment of new trustees.

In every well-drawn settlement it was formerly considered necessary to provide for the appointment of new trustees in case of vacancies by death or otherwise. A statutory power for this purpose was given by Lord Cranworth's Act, and was very generally adopted by conveyancers; but this power has been repealed by the Conveyancing Act, 1881, which, by ss. 31—38, provides that where a trustee original or substituted is dead, or remains abroad over twelve months, or desires to be discharged, or refuses, or is unfit or incapable to act, the person nominated for that purpose in the trust, or if there is none, or none able or willing to act, then the surviving or continuing trustee or trustees (which expression includes a refusing or retiring trustee, *if* willing to act in the execution of this one power), or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint a new trustee or trustees—on such appointment the number of trustees may be increased or diminished, but there must not be less than two, except where one only was originally appointed; and when there are more than two, one may retire without any new trustee being appointed. These sections apply to trusts created before as well as after the Act, and are subject to contrary intention. By s. 34 trust property

(except the legal estate in copyholds, and land mortgaged to the trustees[1]) may be vested in new trustees by a mere declaration of the appointor, or in the remaining trustees by their own declaration, s. 31. This section is not retrospective. Every new trustee, whether appointed by the Court or not, shall have all the powers of the original trustees.

On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property, held on distinct trusts. (Conveyancing Act, 1882, s. 6.)

Liability of trustees to see to the application of the purchase-money.

Elliott *v.* Merryman, 1 W. & T. Cas. p. 64.

When an estate was bought from a trustee the purchaser was never liable to see to the application of the purchase-money, if—

1. The trustee had express power to give receipts; or
2. If the trust was of such a nature as to require time and care for its execution, *e.g.*, to divide the proceeds amongst persons, some of whom were unascertained, or some infants who could not themselves give a receipt, or to pay debts and legacies generally.

But if the duties were simple, as to pay certain scheduled debts, or certain legacies and annuities, the purchaser was not safe without the concurrence of the *cestuis que trust.* The Transfer Act (7 & 8 Vict. c. 76) enacted that the trustee's receipt should in every case be sufficient. But this Act was entirely repealed in the next year by the Real Property Amendment Act, 8 & 9 Vict. c. 106, s. 1. However, Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 23, gave trustees the power to give discharges, excepting when selling under powers; and this omission was supplied by Lord Cranworth's Act, 23 & 24 Vict. c. 145, s. 29. This

[1] This exception is in order to save the rights of the lord in regard to the customary land, and to prevent the trusts of the money appearing in the mortgage.

is repealed and re-enacted by s. 36 of the Conveyancing Act, 1881, acting retrospectively, and trustees' receipts are now in all cases sufficient discharges.

III. Conveyance by Record.—These are called extraordinary conveyances and occur— **III. Conveyance by Record.**

1. When an estate becomes entangled by a multitude of uses, trusts, &c., so that it is out of the power of the Courts to relieve the owner, and a **private Act of Parliament** is necessary.
2. When the Sovereign grants property.

The following may also be included under this head—

3. Conveyance by entry on the Land Register established by the Land Transfer Act of 1875 (38 & 39 Vict. c. 87).
4. Orders of the High Court of Justice, and of Commissioners acting under certain powers given to them by Act of Parliament, as the vesting orders given to the Chancery Division under the Trustee Acts, or the awards of the Inclosure Commissioners, or deeds of enfranchisement made by the Copyhold Commissioners.
5. The disentailing assurances which are now substituted for fines and recoveries; and formerly fines and recoveries themselves.

IV. Conveyance by Custom.—Copyholds and customary freeholds are alienated *inter vivos*, as previously described (p. 77). **IV. Conveyance by Custom.**

CHAPTER VI.

DISPOSITION BY TESTAMENT.

History. **1. History of the Growth of Testamentary Power.**—Before the Conquest every kind of property, real or personal, was freely devisable by will. Personalty continued to be disposed of thus during the Norman period, and has remained so ever since. In fact, personal chattels were of so little account that there was scarcely any legislation on the subject. But the Conqueror checked testamentary disposition of realty, and it could not be left by will directly or indirectly (except in some favoured places, as the City of London) until the reign of Edward III., when it was indirectly permitted by means of uses; the testator used to give the land to some friend by conveyance *inter vivos* to such uses as he should suggest by his will, and to his own use till he died. This was another advantage of uses, *viz.*, that the use was devisable. When the Statute of Uses turned the uses into legal estates, the powers of devising them stopped; and for five years there was again no possibility of devising land, either by direct or indirect means. But the practice had for years become so common that the cessation of it was found to cause great inconvenience, and to remedy this, 32 Hen. VIII. c. 1, amended by 34 Hen. VIII. c. 5, was passed, permitting all socage lands held in fee simple to be devised, and two-thirds of those held by knight service. This continued to be the law until the 12 Car. II. c. 24. Statute of Tenures, by abolishing knight service, rendered all lands of free tenure devisable alike. The Statute of

Frauds allowed the tenant *pur autre vie* to leave his estate by will. Preston's Act, 55 Geo. III. c. 192, first permitted the copyholder to make a will of his copyhold, which before this time had to be surrendered to the use of the will, as freeholds were before the Statute of Uses; for this statute did not apply to copyholds. Estates tail could never be devised,[1] and since the Mortmain Act no devise of land is permitted in favour of a charity. The Wills Act, 7 Will. IV. & 1 Vict. c. 26, makes all other species of property alike devisable.

29 Car. II. c. 3, s. 12.

2. The Solemnities necessary for the Execution of a Will.—[Up to 32 Hen. VIII. c. 1, a will was good though not in writing, such a will being called **nuncupative**, and if it was in writing it did not require to be signed or attested, nor need it even be in the testator's handwriting. It was necessary that he should publish it, that is, declare it to be his will, and that was all. Such continued to be the law as to personal property until the Wills Act, with the exception of some provisions in the Statute of Frauds, which placed nuncupative wills under certain severe restrictions; and the law applied to leaseholds and copyholds when Preston's Act made the latter also devisable. 32 Hen. VIII. c. 1, and 34 Hen. VIII. c. 5, required a will of realty to be in writing, but there were no provisions about signature or attestation. The Statute of Frauds, however, required a will of realty to be in writing, signed by the testator or some other person in his presence and by his direction, and attested in his presence by at least three competent witnesses. But a person who got a legacy, or the husband or wife of such a person, or a creditor or husband or wife of a creditor where there was a charge of

Solemnities.

32 Hen. VIII. c. 1, and 34 Hen. VIII. c. 5.

Statute of Frauds, 29 Car. II. c. 3.

[1] There are one or two other instances in which persons having inheritable estates cannot leave them by will; thus a married woman cannot unless she has a trust or power for that purpose, or the estate is separate property, neither can a joint tenant, for the survivor will take the whole.

debts or legacies on real property, were held not to be credible, and a will attested by such was invalid, until it was provided by a statute of Geo. II. that creditors should be competent witnesses and that legatees should be so too, but that they should not obtain their legacy;[1] but this Act did not extend to a gift to the wife or husband of a witness, and a gift to either of them still rendered the will void.]

7 Will. IV. & 1 Vict. c. 26, s. 9. The Wills Act now provides (and it applies to testaments of every description of property, placing them all on the same footing) that no will shall be valid (with the exception of nuncupative wills of personal estate made by sailors and soldiers on active service) unless in writing, and signed at the foot or end thereof by the testator or by some other person in his presence and by his direction (the Statute of Frauds allowed the signature to be anywhere), and unless such signature shall be made or acknowledged by the testator in the presence of two or more competent witnesses present at the same time (the Statute of Frauds required them to sign in the testator's presence, but was content if they themselves signed at different times), and unless such witnesses attest or subscribe the will in his presence; 15 & 16 Vict. c. 24, passed with a view of particularizing the position of the testator's signature, further enacts that it shall be placed at, or after, or following, or under, or beside, or opposite to, the end of the will; that it shall be clear on the face of it that the testator intended to give effect by his signature to the writing signed as his will. A blank space between the writing and the signature shall not render the will void, but any disposition written after the signature shall have no effect, unless there is another signature after with the witnesses' subscription, &c. Want of the attestation clause, moreover, will not render it void, but it will have to be proved by the oath of the witness as well as the executor.[2] Words of

[1] But a legacy may be given to a witness in a codicil.

[2] The usual form of attestation is as follows: "Signed and

revocation contained in the attestation clause do not form part of the will and have no operative effect. (*In goods of Atkinson*, 31 W. R. 660.) The Wills Act also provides that the incompetency of any attesting witness shall not invalidate the instrument, but that any beneficial gift to an attesting witness or the husband or wife of one[1] (except a charge for the payment of debts, when if one of the witnesses is a creditor, or the husband or wife of a creditor, he can take) shall be void,[2] and the evidence of the witness admissible, and lastly that an executor can be a witness.

s. 14. s. 15. s. 16. s. 17.

If there is a gift to a class, as joint tenants, and one of the class is a witness, the joint tenancy is not severed, but the others will get his share.

A will may be proved either in the principal registry or in the district registry where the testator had a fixed place of abode at the time of his death; but if he dies abroad the proof must be in the principal registry (20 & 21 Vict. c. 77, s. 46).

3. Revocation of Wills.

Revocation.

(1.) **By burning, tearing, or otherwise destroying** the instrument by the testator or some other person in his presence and by his direction, if done *animo revocandi;* but no alteration, &c., shall have any effect (unless it renders the original undecipherable) if it is not executed in the same manner as the will itself, *viz.*, with the tes-

declared by the said AB, as and for his last will and testament, in the presence of us present at the same time, who in his presence and at his request, have hereunto subscribed our names as witnesses." A will is proved in solemn form by a decree of the Court after examination of witnesses. When only the executor's oath or that of one witness is required, it is termed common form.

[1] The marriage of the devisee, after attestation, with a witness, does not affect the devise (*Thorpe* v. *Bestwicke*, 44 L. T. 180).

[2] The witness must not be even indirectly benefited. Thus, suppose there is a joint devise to A and B, and in a codicil, to which A is a witness, the gift to B is revoked, B will not take, nor A, because B's share passes to him in consequence of the revocation; therefore there will be a lapse of the whole devise.

tator's signature and witnesses' subscriptions, &c., in the margin, or near the alteration itself, or some memorandum
s. 21. referring to it. [(The Statute of Frauds permitted a revocation in much the same manner. Under that law, too, any new modification of interest achieved a revocation;)] but by the Wills Act a will shall not become invalid by any alteration of circumstances, except

(2.) **By marriage.**—[In this respect the former law has been changed, for the Statute of Frauds, though it allowed a revocation by marriage alone in the case of a female, yet it made the birth of a child also requisite in that of
s. 18. a male.] But marriage will not revoke a will when made in the exercise of a power of appointment when the estate in default would not have passed to the appointor's heir or personal representative.

(3.) **By another will or codicil or some writing of revocation** executed like a will. But if the second will or instrument of revocation is itself revoked, the prior one will not revive *ipso facto* as under the old law, but the testator will die intestate; for nothing but the re-execution of the original, or a codicil duly solemnised, will effect a revival.

s. 22. (4.) Also, if **the testator has disposed of the property** to which the will relates, **or if** by any means **it ceases to exist,** the will is *ipso facto* revoked, and is said to be adeemed. There is this difference, however, between the old and the new law, that should it again come into his possession, and continue to be so at his death, by the Wills Act the disposition will take effect; [while under the law as laid down by the Statute of Frauds it would not have done so, for then the will spoke from its date, and did not pass subsequently-acquired property, to effect which a fresh will was required.]

Construction. **4. Construction of Wills.**—As wills are often made without legal advice and in a hurry, and as most testators are also ignorant of legal language, it has been considered

inexpedient to apply the same strictness in their interpretation, and to require the same technical expressions as are incumbent for deeds. The law endeavours to decipher the testator's intention if possible, and with this view has judged it best to lay down stated rules for construing certain expressions which are ambiguous, in adhering to which it considers that the object of most testators who have not expressed themselves clearly will be carried out. With this view the Act provides that—

Will speaks from death. s. 24.

(1.) A will of real property now speaks from the death, whereas under the Statute of Frauds it spoke from the date.

Lapse.

(2.) Under the Statute of Frauds, which regulated the former law, there was in every case a **lapse** if the devisee or legatee died before the testator, and the gift failed altogether, and it made no difference if it was given to the devisee and his heirs, such words being merely words of limitation. But now there is to be no lapse in the following cases:—1. Where the legatee or devisee, being (firstly) a child or other issue of the testator, shall die in the lifetime of the testator (secondly) leaving issue, and (thirdly) such issue shall be living at the death of the testator.[1] But owing to the curious wording of the Act, which says that such devise or bequest shall take effect as if the death of such person had happened immediately after[2] the death of the testator, it does not follow (fourthly) that the child or other issue of the testator's issue, who has thus predeceased him, will reap the benefit of the donation. Therefore there are four points to notice in order that this exception may occur. Thus if A by will leaves property to his son B, who dies in his father's lifetime,

No lapse. 1. Gift to issue predeceasing and leaving issue. s. 33.

[1] Also a husband will have curtesy of such property. See *Eager* v. *Furnivall*, p. 38.

[2] Thus, where A devised lands to his son B, who died in A's lifetime, leaving issue, and having devised all his realty to his father—the devise to the father failed, as under s. 33 the son is supposed to have survived him (*Re Henster*, 19 Ch. D. 612).

leaving three children, X, Y, Z, who are living at the time of A's (their grandfather) death, there will be no lapse; but X, Y, and Z may not get the property left by their grandfather. For if their father, B, being of age, died in debt,[1] or left a will giving all his property to a stranger, the creditors in the one case and the stranger would take the property left to B by his father's will; because if B had died immediately after his father, of course the property would have passed under it; and the Act says he is to be taken to have died at that time. If A had merely a general power of appointment over the property, and the instrument giving the power made some gift over in default of appointment, the person to which the gift over was made would not take by B predeceasing the testator, but the property would become part of the general estate of the appointor. (*In re Van Hagan*, *Sperling* v. *Rochfort*, 16 Ch. D. (Ap.) 18.) Hence the rule would apply, and the law is the same if there is no gift over. Therefore in the cases of all powers, if sect. 33 is not applicable, there will still be a lapse. Also there will still be a lapse if the devise is made contingent on the devisee surviving the testator.

2. Special power. 2. If there is (firstly) a special power of appointment with (secondly) a gift over in default, for here the donee has no control over the property owing to the intention of the donor of the power. (*Griffiths* v. *Gale*, 12 Sim. 327.)

3. Estate tail. 3. If an estate in tail is left to any one, a stranger or otherwise, and the latter dies in the testator's lifetime, leaving issue inheritable under the entail, who are living

s. 32. at his death, there shall be no lapse, and the issue shall

4. Gift to a class. take. 4. If the gift is to a class, for all answering that description at the death take the shares of any who have died previously.

Residuary devise. (3.) [Under the old law lapsed or void devises would

[1] If B was under age, the only debts he would be liable for would be necessaries; and he could not make a will at all, except in the case where a nuncupative will is allowed.

not pass under a residuary devise, but went to the heir-at-law, as having been undisposed of. This was because the will, speaking from its date, made every devise which was in form residuary in fact specific. Thus if a testator had four farms, and he devised the first to A, and the rest and residue of his real estate to B, here B took the three remaining farms as if they had been mentioned by name, and if a fifth farm had been subsequently purchased by the testator, his heir would have had it. So if A had died during the testator's lifetime there would have been a lapse as to his farm, but the heir, and not B, would have taken it, although the testator had given B the residue of his real property.] Under the new Act all lapsed and void devises are to fall into the residue, and so will after-acquired property; and therefore B in the above example will take all the farms.

Leaseholds. (4.) [Under the old law a devise by a testator who had a lease for years but no freehold would have passed the lease, but if he had a freehold the lease would not have passed;] under the Act, however, a devise of a man's land will include freeholds, copyholds, and leaseholds, unless a contrary intention appears in the will.

Powers of appointment. [Similarly under the old law, where a person had an estate in land, and was also entitled, by virtue of a power conferred on him for that purpose, to appoint other lands by will, the appointed lands would not pass under a general devise; but in the event of his having no estate the appointed lands would pass.] But since the Act the appointed lands will pass irrespectively of his having realty of his own or not.

Repugnant clauses. (5.) When two clauses are repugnant the latter shall be received and the former shall be rejected, for the maxim is "Voluntas est ambulatoria usque ad mortem."

Largest estate passes. (6.) A fee simple could always be given by will (since wills of realty were permitted) without the use of the word "heirs;" [yet before the Act some words indicative of an

intention to pass the entire interest were required; any words, in fact, which related to the quantity of the estate the testator possessed, and were not merely descriptive, were sufficient.] But now nothing need be used; a devise to A will give A the largest interest which the testator could have given him (excepting an estate tail, which cannot be devised), whereas under the former law he would merely have become possessed of a life estate.

Devise to trustees. (7.) [A devise to trustees, supposing the word "heirs," or other words of limitation, were omitted, would have vested in them such estate as was necessary to enable them to perform the purposes of the trust, and there consequently were frequent disputes as to whether a less estate than the fee would not be sufficient:] but it is now provided that where any realty not being a presentation to a church shall be devised to a trustee or executor, such devise shall be construed to pass the whole interest of the testator, unless a definite term for years, absolute or determinable, or a less estate of freehold, shall be given him absolutely or by implication; and further that where any real estate shall be devised to a trustee without any words of limitation he shall have the fee, although it is evident that the purposes of the trust are not sufficient to exhaust it. This clause is important in regard to the quantity of the estate the *cestui que trust* takes. For example, if Dale is devised to trustees in trust for A, a married woman, remainder to her heirs, A, by virtue of the rule in *Shelley's case* (p. 110), will take a fee simple, the limitation to herself and her heirs both being equitable. But if the words "during the life of A" are inserted after the word "trustees," she will only take a life estate, the limitation to her heirs being a legal estate, as the trustees merely take an estate *pur autre vie*, owing to the above words.

Dying without issue. (8.) [Under the old law the words "dying without issue" signified an indefinite failure of issue, and the de-

visee consequently would get an estate tail, while such a gift of personalty would be altogether void on account of transgressing the rule against perpetuities.] But by the Wills Act these words are considered to imply issue living at the time of the death of the devisee, and therefore they will now operate to vest a fee simple in the devisee, unless a contrary intention appear, subject to an executory devise over to the tenant in expectancy, if he has had no children, or if they have predeceased him, and have died childless. The Conveyancing Act, 1882, s. 10, however, renders void the executory devise over, when any issue of the devisee attain twenty-one, thus putting an end to the settlement at a period nearly corresponding to that in which an estate tail could be barred. The section providing—that where there is a person entitled to an estate in fee or for a term for years absolute or determinable on life or for a term of life, with an executory limitation over, on default or failure of any or all of his issue, whether within or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the executory limitation over was to take effect. The section is not retrospective, and therefore applies only to limitations dating from 1st January, 1883. In personalty such a limitation will give an equitable life interest, which will be enlarged into an absolute interest if he dies leaving issue. A devise over in case a devisee in fee shall die without heirs is void for remoteness. A devise over in case a devisee in fee shall die intestate is also void. (Cruise, Dig. VI. 441; Fearne, 467; *Holmes* v. *Godson*, 8 De G. M. & G. 152.)

CHAPTER VII.

INVOLUNTARY ALIENATION.

Involuntary alienation.—This occurs whenever one man takes land without the will of the preceding owner, and in consequence of some act of his, as when it is seized for—

1. Debt. Crown debts.

1. **Crown debts.**—Estates in fee simple were liable for debts due to the Crown, and estates tail also, by 33 Hen. VIII. c. 39, even in the hands of a purchaser from a debtor, unless they were by simple contract only, and he was without notice of the debt.

Judgments.

2. **Judgments.**[1]—The Statute of Westminster II., 13 Edw. I., introduced the writ of **Elegit**, whereby the creditor could, if he elected to do so, take half the lands of the debtor as well as all his goods, instead of proceeding under the old *fieri facias;*[2] and **De Mercatoribus** also, 13 Edw. I., permitted (in favour of trade) the whole of the lands to be pledged in a **statute merchant. Statutes merchant and staple** are now obsolete, but an *elegit* has been extended to the whole of the land by 1 & 2 Vict. c. 110; but the

[1] Decrees and Orders of Courts of Equity have the effect of judgments (1 & 2 Vict. c. 110, s. 18), and rank equally with them in administration, obtaining priority over specialty and simple contract debts (see p. 217). But there must be a final adjudication to pay a definite sum of money. Therefore no priority is obtained by a chief clerk's certificate, for though it may find a sum to be due it does not amount to an order for payment (*Earl of Mansfield* v. *Ogle*, 1 De G. & J. 38), nor to a foreclosure decree, for it only bars the equity of redemption (*Wilson* v. *Lady Dunsany*, 18 Beav. 299).

[2] An old writ which ordered the sheriff to realize the debt out of the goods and chattels of the debtor, *quod fieri facias de bonis*, &c.

creditor must have registered in the Common Pleas the particulars of the debt and re-registered every five years (2 & 3 Vict. c. 11, s. 4), otherwise purchasers, mortgagees, and creditors were not to be affected; and notice must also have been given to subject them to the extended provisions of the Act, or else they would only be liable to the same extent as they were before it was passed; that is, for half the land. The Act also gave a remedy in equity. Before this time the remedies of creditors against equitable estates were regulated by the Statute of Frauds (sect. 10), and the construction placed upon the statute was that if the trustee had conveyed the lands to a purchaser before execution sued, they could not be taken for the debt of cestui que trust. This construction was more favourable for the purchaser than that of Westminster the Second in regard to legal interests, for these could be taken whenever they were conveyed after judgment entered up; but by 4 & 5 Will. & M. dockets were established wherein the purchasers could search. 1 & 2 Vict. c. 110, assimilates legal and equitable estates in this respect; and other interests, such as copyholds, fall within its provisions, which were not formerly liable to judgments. 23 & 24 Vict. c. 38, cut down the power of the creditor by obliging him to put the judgment in force in three months from its registration; and 27 & 28 Vict. c. 112, which now governs the subject, provides that the land must be actually delivered into execution by virtue of a judgment or some other lawful authority, such as a statute of recognizance. The writ of execution must also be registered, but in the name of the debtor, and not in the name of the creditor, as laid down by 23 & 24 Vict. c. 38; therefore it is not necessary now to register the judgment, as it still was when the writ of execution was put down in the creditor's name.[1] It has

Judgment Extension Act, 1837.

Lord Westbury's Act, 1864.

[1] But if the judgment is not registered, it will not obtain priority over specialty and simple contract debts in administration, because of the risk which the personal representative would

been decided that equitable interests in land are within the Act; the creditor must apply to remove the legal impediment; and the order of the Chancery Division is a delivery into execution. (*Hatton* v. *Haywood*, L. R. 9 Ch. 229.) The creditor is not bound to redeem the prior incumbrance, but the decree for the appointment of a receiver or for sale, entitles him to equitable execution (*Wells* v. *Kilpin*, 18 Eq. 298); and he may obtain a receiver on interlocutory application. (*Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275.) A receiver may be appointed without its being asked for on the writ, without the issue of a new writ. (*Salt* v. *Cooper*, 50 L. J. Ch. 529—App.) Equitable execution may even be obtained by the appointment of a receiver without having previously sued out an *elegit*. (*Ex parte Evans*, 11 Ch. D. 691.) An equitable life interest in a leasehold (which is a chattel) of which the sheriff had not taken possession under a *fi. fa.*, cannot be delivered in execution. (*Ex parte Padwick*, L. R. 8 Eq. 700.) An equity of redemption can be taken, the return of the writ being considered a delivery. (*Champneys* v. *Burland*, 23 L. T. 584.) For any interests which cannot be taken in execution, the only resource is to make the debtor bankrupt. An order from the Chancery Division can be obtained for the sale of the land, which is served on the other creditors, and the proceeds are distributed amongst them according to priority. A writ of sequestration may now also be issued at law as well as in equity (38 & 39 Vict. c. 77, s. 47), and by s. 8, no previous attachment is necessary. The Queen's Bench Division has the same power as the Chancery Division in appointing a receiver, and such an order may be made after judgment has been given in an action. (*Smith* v. *Cowell*, 50 L. T. 38—App.) By the Bankruptcy Act, 1883, s. 146, personalty cannot now be seized under a writ of *elegit*.

Judicature Act, 1875.

otherwise run of inadvertently committing a devastavit by paying debts of inferior degree without being aware of the existence of judgments (*Howe* v. *Shepherd*, 26 L. J. Ch. 817).

3. **Specialty and simple contract debts.**—If a man bound his heir to pay them, the heir was always liable as far as the lands went; the lands were then called "*assets*," being the wherewithal to liquidate the liabilities of the deceased; but if the deceased had devised the lands away, the devisee was not liable until made so jointly with the heir by the Statute of Fraudulent Devises (3 & 4 W. & M. c. 14) re-enacted and extended by 11 Geo. IV. & 1 Will. IV. c. 47, which made the devisee liable alone.

Specialty and simple contracts.

3 W. & M. c. 14.

If the heir was not bound, the land could not be touched by a specialty creditor until Romilly's Act, which also applied to **simple contract** debts, and made all the deceased's estates (not charged with the payment of debts) liable to be administered in the Court of Chancery for their liquidation.[1] These are called **equitable assets under Romilly's Act,** to distinguish them from the other kind of equitable assets, viz., when a debtor devises all his lands charged with or on trust to pay debts; for then specialty and simple contract liabilities are paid *pari passu*, and the assets are so called from the creditor being obliged to have recourse to a court of equity to enforce his claim. These equitable assets are of ancient date. A general direction that debts shall be paid creates a charge on real estate for their payment. (*Ball* v. *Harris*, 4 M. & C. 264.) But not a direction that debts shall be paid by executors (*Keeling* v. *Brown*, 5 Ves. 359), unless they are also made devisees, and not even then if only one is made a devisee (*Warren* v. *Davies*, 2 M. & K. 49), or where they take unequally (*Symons* v.

Romilly's Act.

3 & 4 Will. IV. c. 104.

[1] The difference between a specialty creditor in which the heirs were bound, and one in which they were not bound, therefore, was, that the former could proceed against the real representative directly at law, whereas the latter could only touch him by means of an administration action. By s. 59 of the Conveyancing Act, 1881, this difference is abolished, and every specialty creditor has a direct remedy against the real representative, subject to contrary intention expressed in the deed, and is not retrospective.

James, 2 Y. & C. C. C. 301), or where part only is given to them. (*In re Bailey*, L. R. 2 C. D. 268.)

Order of payment of debts. The order of payment in administration of other than equitable assets is as follows:—

1. Record and specialty Crown debts.
2. Debts to which particular statutes give priority.
3. Judgments registered.
4. Recognizances and other records.
5. Specialty, including rent (*Shirreff* v. *Hastings*, 6 Ch. D. 610), and simple contracts (are paid equally by Hinde Palmer's Act, 32 & 33 Vict. c. 46), and also unregistered judgments against the deceased.
6. Voluntary bond debts.

Order of application of assets. Land is applied to pay debts as follows:—

1. Pure personalty.[1]
2. Land devised on trust to pay debts.
3. Land descended.
4. Land charged to pay debts.
5. Land specifically devised or comprised under a residuary devise, these two being applied *pari passu* for that purpose (*Jackson* v. *Pease*, L. R. 19 Eq. 96; *Lancefield* v. *Iggulden*, 10 Ch. 136), which was also the rule before the Wills Act, every devise residuary in form being then specific in substance.
6. Land over which the testator had a general power of appointment which he has exercised by his will.

[1] The personal estate always forms the primary fund, except—
1. It is expressly exempted.
2. Or exempted by manifest intention, but it is not sufficient to charge the realty alone for this purpose.
3. The debt forming the incumbrance is in its nature real, as a jointure.
4. The debt is contracted by some person from whom the deceased took the estate.
5. In cases falling under Locke King's Acts (see p. 63).

By 36 & 37 Vict. c. 66, s. 25, sub-s. 1 (Judicature Act of 1873), the bankruptcy rules shall apply in the administration of the estates of deceased insolvents as regards— **Insolvent estates.**

1. The rights of secured and unsecured creditors.
2. The debts and liabilities proveable.
3. The estimation of contingent liabilities.

This has been repealed (by 38 & 39 Vict. c. 77, s. 10, the Judicature Act of 1875) and re-enacted, extending the law to the winding-up of insolvent companies. By the Bankruptcy Act, 1883, s. 125, the estate of a deceased debtor may now be administered in bankruptcy, on the petition of any creditor whose debt would have been sufficient to support a bankruptcy petition; but where an order for the administration, otherwise than in bankruptcy has been obtained, the proceedings are only to be transferred to bankruptcy, with the consent of the Court.

Bankruptcy.—The law on this subject is now regulated by 46 & 47 Vict. c. 52. The lands of the bankrupt vest in his trustee and are sold, the proceeds being equally distributed amongst the creditors who have proved their debts. Secured creditors may realize their security and get the same share as other creditors for any surplus which may still be owing, or they may throw their security into the general assets and prove for their whole debt. **Bankruptcy.**

1. If land is alienated to a corporation without the consent of the Crown, it will be forfeited to the lord, if there is one; and if not, to the sovereign. **2. Forfeiture.**

2. If a tenant neglects to render the proper services, and upon action brought to recover them **disclaims** that he holds of the lord, he will forfeit the land to him.

3. [Before 3 & 4 Will. IV. c. 74, and 8 & 9 Vict. c. 106, s. 4, a tortious conveyance by feoffment, or fine or recovery made by a tenant for life of a greater estate than his own, worked a forfeiture for the benefit of the remainderman or reversioner whose right was attacked.]

4. [Before 33 & 34 Vict. c. 23 abolished all forfeitures *propter delictum tenentis*, **attainder for treason** worked an absolute forfeiture to the sovereign, and attainder for felony, a forfeiture to him for a year, day, and waste, after which the land escheated to the lord for ever.]

5. If a copyholder commits waste, demise for more than a year without licence, alienates by any method inappropriate to a base tenure, he forfeits his copyhold to the lord.

6. [Before 33 & 34 Vict. c. 14, amended by 35 & 36 Vict. c. 39, the Crown became entitled by forfeiture to the land of an alien after **office found**;] but now that Act has provided that an alien *ami* may hold land.

7. By Simony (p. 102), the right of presentation is forfeited to the Crown *pro hâc vice*. Also

8. By lapse of a presentation to the Crown (p. 101).

Forfeiture may come also under the heading of title by act of law, as it is the law which gives the estates; but it has been considered here under the heading of act of party, as it is the wrongful doing of the individual which sets the law in motion. 33 & 34 Vict. c. 23, which abolishes all forfeiture for treason and felony, provides for the appointment of administrators of the estates of persons convicted. The Act does not apply to **outlaws**; for persons who will not submit to the law cannot expect to be benefited by its modifications. By 13 & 14 Vict. c. 60, s. 47, a trust estate is not forfeited for the treason of the trustee. According to the better opinion the estate of the *cestui que trust* was formerly forfeited if he committed treason.

CHAPTER VIII.

TITLE BY OCCUPANCY.

A PERSON by merely taking possession of land may acquire a title (i.) immediately as by what is called "general occupancy," and (ii.) when the right of the true owner to recover is barred by lapse of time, the periods being laid down by the Statutes of Limitation.

General occupancy

I. General Occupancy.—When A, tenant for life, gives his interest to B, and, in fact, whenever an estate is given to one person for the life of another, he to whom the interest is given is said to be the tenant *pur autre vie*, and he on whose life the interest is dependent is called the *cestui que vie*. Now if in the above instance B dies first, the question arises what is to become of the land during the residue of A's life, for he cannot take it again having once parted with all his interest. Formerly the first person who entered might keep it, and was called the **general occupant**, it being considered nobody's property. But the Statute of Frauds allowed the tenant *pur autre vie* to devise it, and if he did not it should go to his executors and administrators and be liable to the payment of the debts of the deceased, of course only during the life of the *cestui que vie*, and by 14 Geo. II. c. 20, s. 9,[1] the surplus should be distributed as personal estate.

29 Car. II. c. 3, s. 12.

Exceptions.

1. There was never any general occupancy of land given to B and his heirs, or to B and the heirs of his body, for

[1] Both repealed and re-enacted by 7 Will. IV. & 1 Vict. c. 26, ss. 2, 3, 6. But now the debts are paid before it can be devised.

the heir would become **special occupant** and the question did not arise. But the Statute of Frauds made the heir liable for B's debts to the extent of the special occupancy.

2. Incorporeal hereditaments (such as rent charge) which are not capable of seizure (*Bearpark* v. *Hutchinson*, 7 Bing. 178); but the provisions of the above statutes were extended to them, and if not devised or taken for debt they will go to the personal representatives.

In order that the tenant *pur autre vie* may not conceal the death of the *cestui que vie*, 6 Anne, c. 18, allows the tenant in expectancy, on affidavit, to obtain an order to produce him, and if not produced he shall be considered to be dead. It also provides that if the tenant *pur autre vie* holds over after the determination of his interest without the consent of the next tenant he shall be adjudged a trespasser.

Statute of Limitations. **Legal estates.**

II. Bare possession made indefeasible owing to lapse of time.—It has long been deemed expedient in order to stay litigation that a limit should be put to the time in which actions can be brought to recover property, as, after a lapse of time, it becomes difficult to get at the truth, owing to documents, &c. being lost, and thus to do justice to the case, and, besides, by long possession persons become accustomed to property, and their right to it, as it were, grows—while, on the other hand, delay in asserting one's rights shows either indifference or is suggestive of some fraudulent object. Hence Statutes of Limitation have long since been passed. Those now regulating the law of real property are as follows:—3 & 4 Will. IV. c. 27, s. 40, by which no person could bring an action for the recovery of lands, but within twenty years after the right to bring it first accrued to him; and as to future estates the right first accrued when they fell into possession; but a written acknowledgment of the title of the person entitled, given to him or his agent, and signed by the person in posses-

The Real Property Limitation Act, 1833.

sion, extended the time to twenty years from the acknowledgment. If, on the right accruing, the person entitled has been under disability to sue owing to infancy, coverture, lunacy, or absence beyond seas, ten years were allowed from the time when such disability ceased. No action could, however, be brought after forty years, whether there was disability or not. The Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57, s. 9, has substituted twelve for twenty, six for ten, and thirty for forty years respectively; and has provided that the absence beyond the seas of the plaintiff is no longer a disability. It has also provided as to estates in expectancy, that the right to sue shall be limited to twelve years from the period when time has begun to run against the owner of the particular estate, or to six years from the vesting of the reversionary estate in possession, whichever period is longest; but when the particular tenant is barred, every reversioner claiming under any instrument taking effect after the time when the right first accrued to the particular tenant is also barred. It has not otherwise altered the above Act. After adverse possession for twelve years no acknowledgment of title will revive the right. (*Sandars* v. *Sandars*, 19 Ch. D. 393.)

The Real Property Limitation Act, 1874.

It may be observed that these Acts extinguish not only the remedy, but also the right.

Equitable estates.

Between a trustee holding upon an express trust, and a *cestui que trust*, by 3 & 4 Will. IV. c. 27, s. 25, time would not run until there had been a conveyance for value to a purchaser. This did not apply to a mere charge of debts, which fell within s. 40, above; but frequently, though there was in form a charge, yet it was held that a personal obligation, amounting to an express trust, was imposed upon the person who took the land, and it therefore fell under s. 25. It is therefore provided by 37 & 38 Vict. c. 57, s. 10, that no action shall be brought to recover any sum of money or legacy charged on or

payable out of any land or rent at law or in equity, and secured by an express trust, or to recover any arrears of rent or interest in respect of any sum of money or legacy so charged or payable, and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable, if there was no such trust. This is the only exception to the provision of J. A., 1873, s. 25, sub-s. 2, that no claim of a *cestui que trust* against his trustee for any property held on an express trust shall be barred by any Statute of Limitation.

Concealed fraud. By 3 & 4 Will. IV. c. 27, s. 26, if there is concealed fraud, the right to bring a suit in equity to recover any land or rent through which the plaintiff, or any one through whom he claims, has been deprived through such fraud, shall be deemed to have first accrued, when such fraud could with reasonable diligence have been discovered; but such right shall not avail against any *bonâ fide* purchaser for value who knew nothing of such fraud when he purchased. Concealed fraud does not apply to the case of a person who entered wrongfully into possession. It means designed fraud. (*Petre* v. *Petre*, 1 Drew. 397.) Concealment of the illegitimacy of an eldest son by such son, and by his parents from a legitimate younger son (*Vane* v. *Vane*, 21 W. R. 66), is one instance.

Advowsons. A longer period is given to recover advowsons, the limit to enforcing the right of presentation being sixty years, or to three successive incumbencies, all adverse to the right of presentation claimed, if the three incumbencies amounted to more than that time; but in no case can an action be brought after 100 years (s. 33).

Money charged on land and legacies. Money secured by any mortgage, judgment, or lien, or otherwise charged on land at law or in equity, or any legacy, must be recovered in twelve years (formerly twenty), after a right to receive it has accrued to some person capable of giving a discharge for the same, unless part of the principal or some interest has been paid, or some acknow-

ledgment given, signed by the person by whom the same shall be payable, or by his agent; in which case time runs from such payment or acknowledgment, or the last of them, if several.

Nothing in these Acts shall interfere with any jurisdiction of equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring a suit shall not be barred. (3 & 4 Will. IV. c. 27, s. 27; 37 & 38 Vict. c. 57, s. 9.)

These Acts do not apply to the Crown. But by the Nullum Tempus Act (9 Geo. III. c. 6), amended by 24 & 25 Vict. c. 62, the right of the Crown to recover lands or rent is barred after sixty years.

CHAPTER IX.

TITLE BY ACT OF LAW.

Escheat.

1. A PERSON claiming by **Escheat** claims by act of law [It might have happened—

(1.) **Propter delictum tenentis.**—This occurred when the tenant committed felony. It must be distinguished from forfeiture; the land **escheated** to the lord, but it was **forfeited** to the Crown.] This right of the lord is now done away with by 33 & 34 Vict. c. 23.

It may still happen—

(2.) **Propter defectum sanguinis**—when a man dies without having disposed of his lands; or when his will, owing to some informality, cannot take effect; or when the devisee by reason of some disability cannot take, as an alien enemy; or when, having made no disposition, his heir is a person who cannot inherit—in all these cases the land escheats to the lord, and if there is no lord, to the Crown. This right of escheat, one of the feudal incidents which has never been abolished, has been much curtailed of late years, an alien *ami* having been put on the same footing as a natural born subject in this respect, and the law being relaxed, when a bastard is the purchaser by Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 19, though a bastard still cannot inherit, nor an alien enemy, nor an outlaw.

But, on the other hand, it has been extended by 47 & 48 Vict. c. 71, s. 4 (Intestates' Estates Act, 1884),

in this wise—that incorporeal hereditaments and equitable estates in corporeal hereditaments shall escheat.

2. **Dower and curtesy** are also titles by act of law, and also the right to the rents and profits of the wife's land, which the husband enjoys during the coverture. **Dower and curtesy.**

3. There are also estates arising by implication of law (*previously referred to*—p. 38) which are the consequence of endeavouring to follow the intention of a testator, *e.g.*, if a man gives lands to his heir-at-law after the death of his wife, then the wife shall have a life estate; for if she does not take it no one else can. Or if Blackacre is devised to A and Whiteacre to B in tail, and if they both die without issue, then to C in fee—here A and B have cross-remainders by implication, and on the failure of the issue of either, the other and his issue may take the whole, and C's reversion shall be postponed till the issue of both shall fail. (2 Kerr's Bl., p. 335.) **Implication of Law.**

4. By far the most important title by act of law is title by **Descent.**—When the person seised of an estate of inheritance dies intestate he who succeeds him is called his heir. A man's heir is determined by the canons of descent as laid down in the **Inheritance Act** (3 & 4 Will. IV. c. 106). Before this Act a series of rules introduced by custom during the Norman and early Plantagenet period and systematized by Lord Hale were followed. The heir may be either a descendant, ascendant, or collateral. Ascendants in the direct line were never admitted before the new Act, because it was considered that the estate must have come through them to the deceased, and they consequently must have already enjoyed it; on the other hand, collaterals were admitted as early as the reign of Henry II., brothers and sisters and their children succeeding first—then uncles and aunts and theirs. The law was the same **Descent.**

whether the estate had been granted to the deceased himself, or if he had inherited it, the rule being that a **feudum novum**, that is, an estate acquired by the deceased, should be held **ut feudum antiquum**, an estate given to his ancestors; for otherwise the collaterals could not take a *feudum novum*, for their descent must be traced through the common ancestor; and, as just observed, in no case could the common or any direct ancestor of the deceased take, for to be consistent they must have had it as they would have done if it was really a *feudum antiquum*. Therefore the fiction which let the collateral in, kept the lineal ascendant out. Yet there was still one discrepancy; suppose a younger son had acquired a *feudum novum*, although his father and grandfather could not claim, yet his uncle and elder brother could, whereas had it been a *feudum antiquum* they must have had it first. However, all these distinctions are swept away by the new Act.

The four great changes introduced are—

1. Descent is traced from the purchaser.
2. Lineal ancestry can succeed.
3. Half-blood are admitted.
4. More remote female ancestors are preferred to those less remote.

The first four rules of the Act apply to descendants only, and therefore relate to an estate tail as well as to a fee simple, remembering that in an estate tail male the daughters cannot take, nor in an estate tail female the sons.

(1.) **Inheritances shall lineally descend to the issue of the purchaser in infinitum.** A purchaser is "he who does not inherit," and the word therefore includes every conceivable mode of acquisition, excepting that of descent, or any analogous title, such as that of partition, escheat, or enclosure, &c. Under the old law it was traced from the person "last seised;" an inconvenient doctrine and one often working injustice, as many a man might be entitled without having acquired the feudal seisin. At present,

if it is shown, firstly, that a person was entitled, and secondly, that he did not inherit, he will be considered as the stock of descent, without reference to the question whether he was actually possessed or not.

(2.) **Males shall be preferred before females.** The reason for this preference may be traced from feudal times; men could render the military services and women could not.

(3.) **Amongst males of equal degree of consanguinity the eldest shall inherit; but the females shall inherit together.** In the Saxon period males were certainly preferred to females (owing perhaps to the fact that an imperfect system of feuds prevailed before the Conquest), but they inherited equally. Primogeniture is of purely Norman origin: it was established in regard to military tenures by the Conqueror, but in socage lands did not oust the old custom till the reign of Henry III., and in gavelkind has never yet succeeded in doing so. (Glanville, 1, 7, c. 3; Mirrour, c. 1, s. 3; Bracton, lib. 2, c. 30, 31.)

(4.) **All lineal descendants in infinitum shall represent their ancestor.** This is called succession *per stirpes* as opposed to *per capita.* Thus if A and B are two sisters, and A dies leaving C and D two daughters, and B dies leaving E one only surviving, C and D shall take one half of the inheritance and E the other half, as they stand in the place of their respective ancestors; had each taken one-third it would be called succession *per capita.* If A alone dies it was a question whether, under Rule 1, B, her sister, should not take half her share, and her issue, C and D, the other half only. It is now decided that the issue take all, under Rule 4. (*Cooper* v. *France*, 14 Jur. 214.)

(5.) **On failure of lineal descendants the nearest lineal ancestor shall take.** This is the father, the very person who under the former law was excluded. If he is dead the rest of his issue are exhausted, the order prescribed by the above four rules being followed; that is, the line of his eldest son is examined first—males being preferred

to females, &c., exactly in the same manner as the descendants of the purchaser himself were gone through.

(6.) **The father and all the male paternal ancestors of the purchaser and their descendants, shall be admitted before any of the female paternal ancestors or their heirs; all the female paternal ancestors and their heirs before the mother or any of the maternal ancestors or theirs; and all the male maternal and their descendants before any of the female maternal or their heirs.** Therefore, on the failure of issue of the father or his descendants, the father's father comes next: then come his descendants in the same order as before; and then the father's father's father and his descendants, and so on up till all are exhausted. Two points must be noticed in this rule—

1. That the paternal line takes precedence over the maternal.
2. That in each line the male branch is preferred to the female.

The reason for this favour shown to males in the second case is, that in a *feudum antiquum* the object was to discover to whom the estate was given, in accordance with the feudal rule that the heir must be of the blood of the first feudatory; and in a *feudum novum* the principle applied to a *feudum antiquum* was copied, and the collateral, in the latter case, was supposed to acquire a feud of indefinite antiquity by descent from an unknown purchaser, and it was argued that the collateral *ex parte paternâ* of the last tenant was more likely to be of the blood of this purchaser than the collateral *ex parte maternâ*, the presumption being that the last tenant most probably inherited from a male; but as he might have inherited from a female, by tracing that stock afterwards they made the matter certain. If, however, in a *feudum antiquum* it was known that the deceased had inherited through a female, none of the stock on the male side were permitted to succeed at all, and similarly *vice versâ*.

(7.) **Kinsmen of the half blood shall inherit next after kinsmen of the same degree of the whole blood and their issue if the common ancestor is a male, and next after the common ancestor herself if a female.** Before the Act the half blood could in no case succeed at all. Half blood are either *consanguinei*, that is, by the same father; or *uterini*, by the same mother. Their exclusion was most unreasonable in some cases. Suppose A had an estate, and two sons by different wives. A dies, and his eldest son becomes seised. On his death without issue, his half-brother could not get the estate, whereas if the elder had died before he actually became seised, the younger could have succeeded, as he would have claimed through the father. Were they half-brothers uterine, the younger being the son of a second husband, similar injustice might have occurred if the estate had belonged to the mother; if it had belonged to the first husband, the younger of course could never have claimed.

This exclusion is supposed to have arisen from a misapprehension of the Norman Rule on the introduction of the feudal system. In Normandy half-blood *uterini* were alone excluded; and rightly because the children by the second husband would have no claim to the estate of the first one; and estates in feudal times usually belonged to males. But the difference was not understood in England, and the exclusion became general.

(8.) **Amongst the female paternal or female maternal ancestors, the mother of the more remote male paternal or male maternal and their heirs respectively shall be preferred to the mother of the less remote male paternal or male maternal and their heirs respectively.** Before the Act, it was a subject of dispute whether the nearer or more remote female ancestor should be resorted to first.

Another rule has been added by Lord St. Leonards' Act. It enacts that, "**where there is a total failure of the heirs of the purchaser, or where any land shall be descen-** 22 & 23 Vict. c. 35, ss. 19, 20.

dible, as if an ancestor had been the purchaser of it, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall descend, and the descent shall thenceforth be traced from the person last entitled to the land as if he had been the purchaser thereof." Thus, suppose A illegitimate dies intestate, leaving an only son, and this son also dies intestate and childless. A being a bastard is *nullius filius*, and can have no heirs excepting those of his own body. Therefore, the land must have escheated. This rule, however, prevents that; the descent will be traced from his son—who had a mother, and therefore she and her heirs can succeed. It will of course be remembered, that as A's wife she has no claim by the law of descent. She is entitled to her dower, to enforce which she can bring an action in the Queen's Bench Division of the High Court of Justice, and nothing else, not being of A's blood.

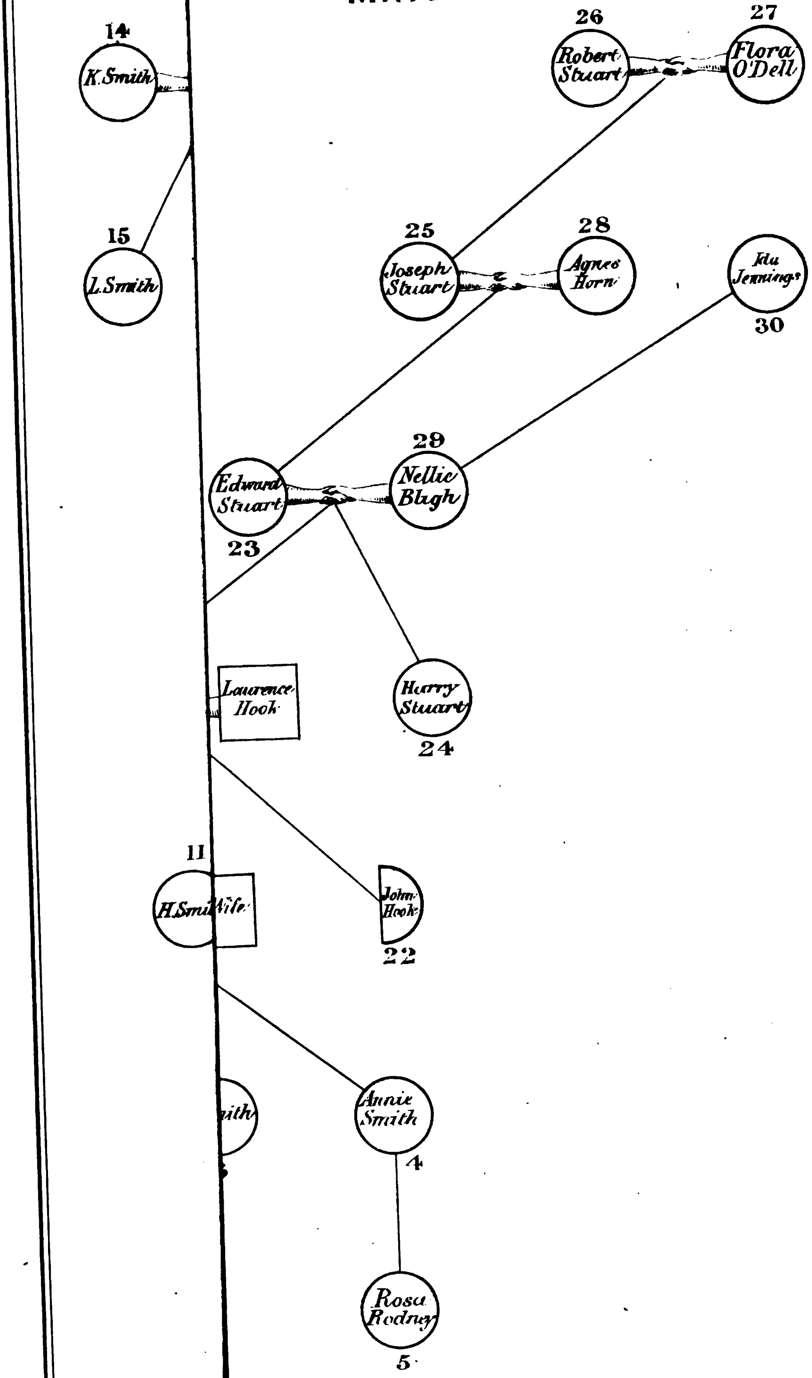
If an estate is given to the heirs of A, A of course takes nothing; but descent is traced from him as if he was the purchaser. Thus, devise Dale to A for life, remainder to the heirs of B. Here, on B's death, B is the stock of descent, his heir (C suppose) acquiring a vested remainder. If he does not dispose of it, and dies later, the person entitled is the heir of B, and not the heir of C, B being considered in the light of a purchaser.

In the accompanying table, A. Smith is the purchaser. On his death intestate

1. B. Smith, his eldest son by his first wife, succeeds him.

2. C. Smith, the son of B. Smith, succeeds his father, and his eldest son will succeed him, and so on *in infinitum*. If B. Smith has other sons, they will take in order of age, if C. Smith and his issue fail (r. 3); and if they and their issue become extinct, his daughters, if he has any, will share equally (r. 3). On the entire failure of issue of the eldest son, B. Smith, the estate reverts to

MATERNAL LINE.



3. D. Smith, the son of the purchaser by his second wife. If there had been any more sons by the first wife they would have taken before him, but he is preferred to daughters by her. On his death, his issue take in the order prescribed by rules 2, 3, 4, and on their failure—

4. The three daughters of the purchaser, Minnie, Sophie, and Annie Smith, inherit as coparceners (r. 3).

5. On their decease, their daughters, Honoria, Marion, and Rosa, succeed to their mothers' shares respectively. If one of the mothers, Sophie Smith, for example, had several daughters, they would take her share as coparceners. If she had sons as well, the daughters would be postponed to the sons, who would take in order of age (r. 3).

6. On the issue of the purchaser becoming extinct, the estate will descend to his father, E. Smith, in accordance with r. 5—

7. Whose daughters by his first wife, Fanny Stephens, the mother of the purchaser, next succeed as representing their father; and their issue afterwards, if they have any, will take their shares in the order prescribed by r. 3. If the purchaser had a brother he would have succeeded before his sisters (r. 2). In fact, rr. 2, 3, 4, are followed, in regard to the succession of the issue of each ancestor—the same as were adhered to in tracing the issue of the purchaser.

8. On the failure of the issue of E. Smith, by his first wife, Tom Smith, his son by his second wife, and half brother to the purchaser, will inherit; for the half blood succeed next after kinsmen of the same degree and their descendants when the common ancestor is a male (r. 7). On failure of his issue all the descendants of the father of the purchaser are extinct, and the estate—

9. Will descend to the grandfather of the purchaser, F. Smith. Then to

10. His son, G. Smith, uncle of the purchaser; and on his death to

11. His son, H. Smith, cousin of the purchaser. On the failure of the issue of F. Smith, it will descend to

12. J. Smith, the great-grandfather of the purchaser. Then to

13. His son, J. Smith, and his issue, rr. 2, 3, 7, being still adhered to. On their failure, to

14. K. Smith, the great-great-grandfather of the purchaser. After him

15. His son, L. Smith, will represent him and his other children, &c., in the order of rr. 2, 3, 4, as above. The male paternal ancestry of the purchaser being now exhausted, the female paternal must be resorted to—the mother of the more remote male paternal being preferred to the mother of a less remote male paternal ancestor (r. 8).

16. Mary Grove, accordingly succeeds, and on her decease

17. Her son, Sam Simpson, by her second husband, Peter Simpson, in accordance with r. 7, which prescribes that the half blood shall inherit next after the common ancestor when a female (Mary Grove's children of the whole blood have already been disposed of). Her ascendants would come next if she had any living; in default of which,

18. Ophelia Head, the next more remote female paternal succeeds. Then the estate descends to

19. Her mother, Grace Darling—indeed the ascendants of any ancestor succeed in the same order as the ascendants of the purchaser himself.

20. After Dora Dodd, the purchaser's grandmother, who is next, the paternal line becomes extinct.

21. The purchaser's mother, Fanny Stewart, takes first amongst the maternals, and

22. Her son, John Hook, by Lawrance Hook, her second husband and half brother to the purchaser, succeeds her. Following him

23. Edward Stewart, maternal grandfather to the purchaser succeeds, and then

24. His son, Harry Stewart, maternal uncle to the purchaser. His issue, if living, would then take according to rr. 2, 3, 4; and if not,

25. Joseph Stewart, father of Edward Stewart, and his issue. Such issue failing,

26. Robert Stewart, father to Joseph Stewart, becomes entitled, and after him his issue. Such issue failing, the whole male maternal line of the purchaser is exhausted, and resource must be had to the female maternal (r. 6).

27. Flora O'Dell is the mother of the most remote male maternal, and she consequently (r. 8) will become entitled, and her issue, if any (half blood), will succeed her, and then her ascendants and their issue in the same order. On their failure,

28. Agnes Horn, wife of Joseph Stewart, inherits, being the next most remote female maternal.

29. Then Nellie Bligh, grandmother of the purchaser; and

30. Lastly, her mother, Ida Jennings.

The issue of the ascendants and their fathers and mothers have been put in this table at random, sometimes a son is given, sometimes a daughter, but the same rule holds throughout; males and their issue succeed before females and theirs; the males take in order, the females together; fathers and their descendants and ascendants take before mothers and theirs, and so on. For instance, if Nellie Bligh (number 29), had had a father living, he would have taken before her mother, Ida Jennings; and his issue and then his ascendants would have succeeded him; if Nellie Bligh had had issue by a second husband such issue would have inherited immediately after her (r. 7), and any issue of such issue would have followed them. The rules indeed are repeated in every case when applicable.

CHAPTER X.

EQUITABLE ESTATES.

Estates exist in contemplation of law and in contemplation of equity. The origin of the latter has been explained in the chapter on the Statute of Uses, and may be defined to be an estate recognized as belonging to a person or persons by courts of equity, although the legal ownership is not necessarily attached to it. Though equitable estates usually arise by limitation to trustees to hold for the benefit of a third person, yet they may be created in other ways. Thus, the equity of redemption of a mortgagor (p. 53), the vendor's lien (p. 183), the interest of a vendee after a contract of sale (p. 184), the interest of a purchaser in an estate bought in the name of a stranger (p. 162), are all equitable estates.

The maxim is that equity follows the law, and in consequence equitable estates may be limited in the same manner as legal ones; viz., for life, in tail, in fee, &c., and the rules of descent and primogeniture, the rule against perpetuities, the rule in Shelley's case (p. 110), and most other real property incidents, apply in regard to them, and also they now escheat as mentioned on p. 227. But equity is much more liberal in its rules of construction and interpretation. Thus an equitable estate may be created without adhering to any technical terms, the intention being all that the Court looks at. The rule as to the failure of a contingent remainder by reason of the premature failure of the particular estate never existed as

to them. Again, equity considers that done which ought to be done. Therefore if land is given to B, a trustee, in order to be sold, and the proceeds paid to C, it will consider C's estate of a personal and not of a real nature; and this will still be the case, although the land is not yet sold; and on C's death (as noticed, *suprà*, p. 117), legacy and not succession duty, will be paid; and, on the other hand, if money is given to a trustee to be laid out in land, equity will consider the property land, although it has never been so laid out.

Before the Statute of Frauds, 29 Car. II. c. 3, a trust could have been created or transferred without even writing; but the 7th section of that statute enacts that all declarations and creations of trust of land, tenements and hereditaments shall be manifested and proved by some writing, signed by the party, who is by law enabled to declare such trust, or by his last will in writing; and section 9 requires that all assignments of trust shall be in writing, signed by the person assigning the same or by his last will. Section 8 excepts from the statute trusts arising from any conveyance, by implication, or construction of law, and trusts transferred or extinguished by act of law. It has subsequently been decided that copyholds and chattels real (*Foster* v. *Hale*, 3 Ves. 696) are within the Act, but chattels personal are not.

APPENDIX.

A. Page 2.

Estates considered as to their quantity and quality.

- **Quantity.**
  - Freehold.
    - Estates of inheritance.
      - Fee simple.
        - Absolute.
        - Determinable:
          - conditional at the common law.
          - qualified or base.
        - (Co. Litt. 18 a.)
      - Fee tail.
        - General—male.
          - female.
        - Special.
    - Estates less than inheritance.
      - Life estates.
        - Conventional.
        - Legal.
  - Less than freehold.
    - Estates for years.
    - at will.
    - at sufferance.

- **Quality.**
  - 1. As to the duration or legal magnitude of the estate.
    - 1. Those absolute and unrestricted, both as to time and person, as an ordinary fee simple.
    - 2. Those limited as to time, as a determinable fee.
    - 3. Those restricted as to persons, as a fee tail male.
  - 2. As to the time of enjoyment.
    - In possession.
    - In expectancy:
      - 1. At the common law.
        - Reversions.
        - Remainders.
          - 1. Indefeasible.
          - 2. Vested.
          - 3. Contingent.
      - 2. Under the Statute of Uses.
        - Executory Interests.
          - Springing / Shifting — Uses.
          - Executory devises.
  - 3. As to the number and connection of the tenants.
    - 1. In severalty.
    - 2. Pro indiviso.
      - 1. Joint tenancy.
      - 2. Coparcenary.
      - 3. Tenancy in common.
      - 4. Entireties.

B. Page 14.

Tenures now existing in England.

Socage and its Varieties which are:—

1. **Gavelkind.**—Unless the contrary is shown, all lands in Kent are presumed to be of this nature. The ordinary canons of descent apply to it, except that males inherit equally. The husband is entitled to curtesy, whether he has had issue born or not. It extends to half the land, and ceases if he marries again. Dower is also a half, and continues while the wife is unmarried and chaste. There was no escheat for murder, but it is forfeited for treason; which shows that the latter did not prevail in the Saxon times, while the former did. Devise by will was always permitted, and a conveyance by feoffment is still allowed at fifteen years of age, the Real Property Amendment Act, 8 & 9 Vict. c. 106, s. 3, expressly recognizing the custom. These incidents are traces of the Saxon times, and are preserved in consequence of privileges obtained from the Conqueror.

2. **Borough-English,** in which the youngest son inherits, the legitimacy of the eldest being questionable owing to the right of concubinage, which the lord once enjoyed with the tenant's wife on her wedding night. But this is now contradicted, and the form of tenure is rare.

3. **Petit Serjeanty,** where the tenant had to supply the king with arms, &c.

4. **Burgage**—which is the tenure in ancient boroughs in respect of tenements held of the king or other lord by a certain annual rent; it is really socage, though subject to local customs.

Grand Serjeanty, which was retained by the Statute of Tenures, 12 Car. II., c. 24, though assimilated to socage, excepting that the tenant has to perform certain honorary services, such as to carry the king's banner, &c.

Cornage—a species of Grand Serjeanty. (Page 13.)

Frankalmoign, or free alms.—When land was given to religious houses free from all services. Were the sovereign

not lord paramount of all the land in England, this tenure would be allodial.

Customary Tenures:

1. Copyhold. (Page 71.)
2. Customary freehold. (Page 83.)
3. Ancient demesne. (Page 83.)

C. Pages 1, 3.

In page 1 it is stated that incorporeal things cannot be correctly classed under tenements; and in page 3, that rents, commons, &c., are capable of tenure. These remarks may appear contradictory, but are really not so. From their nature —if self-existing—things incorporeal cannot be subject to such incidents as fealty, escheat (though statute law has now made them liable to this), and the like (for instance—the benefit to be obtained from another's land merely ceases to exist when the recipient of it dies without heirs), and therefore the rules of tenure are not applicable to them. But De Donis, which professes to apply to all tenements, applies to them; therefore it may be said that they are tenements as far as De Donis is concerned. (See page 72.)

D. Page 70.

Instances of some prerogatives of the Crown.

Mr. Hallam defines prerogative to be that law in case of the king, which is law in no case of the subject. (Middle Ages, v. iii., p. 148.) It is really a privilege which the Crown has, and which the subject has not.

1. The rule that half blood could not succeed never applied to the succession to the throne.

2. No one can be tenant at sufferance against the Crown, but he is an intruder.

3. *Nullum tempus occurrit regi—e.g.*, if the King is entitled by lapse to present to an advowson, the patron cannot oust his right on non-presentation. The reason for this maxim is that the sovereign is supposed to be so occupied busying himself for the welfare of the people that he has not had time to do so.

4. A person cannot hold jointly with the Crown.

5. A chose in action was not generally assignable before the Judicature Act of 1873; but the Crown could always give or take one.

6. There could be no general occupant against the Crown.

7. Deeds are always construed most favourably for the Crown. (Page 174.)

8. The Crown can take a fee simple, even without the use of the word survivors, as is necessary for other corporations sole.

9. The Crown pays no tithes, no taxes, duties, &c.

10. The Crown can reserve a rent out of an incorporeal hereditament, and distrain on the lands of the lessee to recover the same if not paid. (Page 96.)

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THE END.

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